Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

NICHOLAS A. CHIARAMONTE,

Petitioner,

v.

FASHION BED GROUP, INC.,
a division of LEGGETT & PLATT, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Once a plaintiff establishes a *prima facie* case of employment discrimination, how much evidence is required to create a genuine issue of material fact regarding the issue of pretext requiring a resolution at trial?

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JURISDICTION

The Judgment of the Court of Appeals was entered on November 4, 1997. The Petition for a Writ of Certiorari therefore is due on or before February 2, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

In March of 1992, Petitioner, Nicholas A. Chiaramonte ("Chiaramonte"), was employed by a company known as Fashion Bed Group, a division of Leggett & Platt, Inc. Chiaramonte was employed as Vice-President of Research and Development. On March 12, 1992, he was 59 years old and on that date, he was terminated and replaced by Rob Cummins, then 32 years of age. On the day of his termination, Chiaramonte was told by the Employer's Chief Executive Officer that his age was a factor in the decision to terminate his employment.

Chiaramonte brought an action under the A.D.E.A., 29 U.S.C. § 631(a). The United States District Court for the Northern District of Illinois granted summary judgment and dismissed Chiaramonte's claim. The United States Court of Appeals for the Seventh Circuit affirmed that ruling and found that Chiaramonte had failed to present

evidence sufficient to demonstrate the existence of genuine issue of material fact regarding pretext.

In March of 1992, Fashion Bed Group ("F.B.G.") terminated Chiaramonte. Chiaramonte was employed as Vice-President of Research and Development in March of 1992. He was 59 years of age.

F.B.G. was run by John Elting ("Elting) (in March of 1992, 37 years of age) and Dick Singer ("Singer") (in March of 1992, 60 years of age). The company was a subsidiary of Leggett & Platt, Inc. which created the entity by buying and consolidating two brass bed manufacturers, Dresher and Berkshire. The merger of the companies and consolidation of assets in 1990 created economic losses for the new entity.

By the Spring of 1992, Elting was elevated to the position of C.E.O. and decided to reduce costs by downsizing the management team. At the time Elting made his decision, the Engineering Department at F.B.G. was supervised by Chiaramonte and Rob Cummins ("Cummins") (32 years of age). Cummins had worked under Chiaramonte for several years. In the Fall of 1991, Elting and Singer changed the engineering structure and gave Cummins supervisory authority over the so-called "detail work," leaving Chiaramonte to supervise all other facets of engineering.

Regarding the March 1992 downsizing, Elting testified he alone made the decisions as to which employees would be terminated. In the Engineering Department, he terminated Chiaramonte (age 59) and kept Cummins (age 32). During his deposition, he maintained that he made

the decision based upon the fact that Chiaramonte was earning $40,000 more than Cummins.

Neither the District Court nor the Seventh Circuit disagreed that Chiaramonte could prove a *prima facie* case of discrimination under the burden-shifting method of proof. (Appendix, p. 12.)

Chiaramonte was 59 years of age, performed his job well and was terminated. In response to that *prima facie* showing, the Seventh Circuit noted as follows:

> FBG presented two legitimate, non-discriminatory reasons for Chiaramonte's termination: (1) FBG's need to reduce operating costs, and (2) the fact that Chiaramonte's job was not essential to FBG's continued operations. *See Baxter Healthcare Corp.*, 13 F.3d at 1125-26 (Employer does not violate ADEA by terminating employees to reduce salary costs.) As noted above, the mere production of these reasons shifts the burden to Chiaramonte to prove that the stated reasons are simply pretext for age discrimination.
>
> In assessing whether Chiaramonte has met his burden of showing pretext, this Court must consider the presumption of non-discrimination that arises from the facts of this case. We have previously held that when an employee is hired and fired by the same decision-maker in a relatively short time span, a presumption, or inference, of non-discrimination arises.

(Appendix, p. 14.)

In an effort to demonstrate the existence of an issue of act as to pretext, Chiaramonte proffered the following evidence:

(1) He was terminated while an employee almost 30 years younger was retained and promoted into his position.

(2) Nine months after he was terminated to save $40,000, two employees were hired to perform some of his previous work at a combined salary in excess of $40,000.

(3) At the same time that Chiaramonte was fired to save $40,000, F.B.G. hired consultants and paid them $1.5 million. Some of the consulting work was formerly done by Chiaramonte.

(4) F.B.G. relied on the deposition testimony of Elting to establish its legitimate, non-discriminatory reason, savings of salary, for the court. That testimony was impeached as Elting had given a completely different set of reasons at a fact-finding conference before the Illinois Department of Human Rights, at which he failed to mention any economic justification for his decision.

(5) On the day of his termination, Chiaramonte went to Singer, up until that day C.E.O. of the company, and asked why he was terminated. Singer told him that his age was one possible factor.

(6) On the day Elting fired Chiaramonte, he presented him with a severance document offering three weeks pay and Chiaramonte's accrued vacation pay in exchange for a waiver of age discrimination claims. In Illinois, the law requires that vacation pay be paid with any final pay check.

The Seventh Circuit discussed some of the above evidence in its opinion and concluded that Chiaramonte had failed to demonstrate that an issue of fact existed as to pretext and, therefore, summary judgment was appropriate.

REASONS FOR GRANTING THE PETITION

This case presents a recurring issue of considerable practical importance. An ever increasing number of employment discrimination cases are disposed of without trial.

Following this Court's decision in *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993), the Circuit and District courts have established varying approaches to the amount of evidence that a plaintiff must present to create a genuine issue of fact as to whether or not a plaintiff who proves a *prima facie* case of discrimination can survive a motion for summary judgment.

Many decisions are reached by the courts under a procedure which proceeds directly to the Employer's proffered reason in order to determine if a plaintiff has evidence of pretext sufficient to withstand summary judgment. *E.E.O.C. v. Our Lady of Resurrection*, 77 F.3d 145, 149 (7th Cir. 1996).

Thus, the appropriate standard to be applied to Petitioner's evidence at the pretext stage of the analysis is critical to the determination of whether or not a plaintiff will be allowed to proceed to trial. The outcome of such a

determination may well depend on a plaintiff's venue in a particular Circuit as to this critical issue.

The District Courts and Circuit Courts have adopted varying standards for the proof required to prove pretext.

A.

The District and Circuit Courts Have Adopted Various Standards Regarding The Quantum Of Proof An Employment Discrimination Plaintiff Must Produce Regarding The Issue Of Pretext On Summary Judgment

"Pretext Only" or "Pretext Plus"?

The response to the opinion in *St. Mary's Honor Center v. Hicks* has varied throughout the Circuits. Some Circuits have held that summary judgment against the plaintiff who proves a *prima facie* case is inappropriate. If the defendants stated reason for the employment decision can be characterized as false, "pretext only" and others require proof of pretext, as well as additional evidence of discrimination, "pretext plus."

The Third Circuit in *Waldron v. SL Industries, Inc.*, 56 F.3d 491, 495 (3rd Cir. 1995), explicitly endorsed the "pretext-only" approach and held that:

> "If the plaintiff has pointed to evidence sufficient to discredit the defendant's proffered reasons, to survive summary judgment the plaintiff need not also come forward with additional evidence beyond his or her *prima facie* case.

The Sixth Circuit declined to adopt either standard in *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994), but, nonetheless, applied what appears to be a "pretext-only" standard in requiring only that the "plaintiff must produce sufficient evidence from which

the jury may reasonably reject the employer's explanation." *See also, E.E.O.C. v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831 (6th Cir. 1997).

The Seventh Circuit has announced a "pretext-only" position in *Essex v. UPS*, 111 F.3d 1304, 1310 (7th Cir. 1997) (holding that pretext may be shown by evidence indicating that the proffered reason is unworthy of credence); as has the Ninth Circuit, in stronger language, *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912 (9th Cir. 1995) ("Once a prima facie case is established . . . summary judgment will ordinarily not be appropriate on any ground relating to the merits . . . "). Finally, the Tenth Circuit has rejected the "pretext-plus" doctrine and in *Randle v. City of Aurora*, 69 F.3d 441, 453 (10th Cir. 1995), held that:

> [i]t is not the purpose of a motion for summary judgment to force the judge to conduct a "mini trial" to determine the defendant's true state of mind. So long as the plaintiff has presented evidence of pretext (by demonstrating that the defendant's proffered non-discriminatory reason is unworthy of belief) upon which a jury could infer discriminatory motive, the case should go to trial.

A conflicting approach has been adopted by a number of Circuits requiring that in order to survive summary judgment, the plaintiff must show "pretext-plus" discriminatory intent. The First Circuit has consistently held that "evidence contesting the factual underpinnings of the reasons for the [employment decision] proffered by the employer is insufficient, without more,

to present a jury question." *Hoeppner v. Crotched Mountain Rehabilitation Ctr., Inc.*, 31 F.3d 9, 17 (1st Cir. 1994).

The Fourth Circuit's position can be described as the "pretext-plus" approach, which it followed in *O'Connor v. Consolidated Coin Caterers Corp.*, 84 F.3d 718, 719 (4th Cir. 1996), an ADEA case, wherein it was held that:

> . . . the plaintiff bears the ultimate burden of proving both that the employer's asserted reason was pretextual and that the plaintiff's age was the true reason for the challenged employment decision."

Similarly, the Fifth Circuit has ruled that "the 'pretext only' doctrine is not enough." *Marcantal v. State of Louisiana, Dept. of Trans. and Dev.*, 37 F.3d 197, 200 (5th Cir. 1994); *Polanco v. City of Austin, Texas*, 78 F.3d 968, 976 (5th Cir. 1996).

The Eighth Circuit has announced a compromise between the two pretext positions as stated in *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1334-35 (8th Cir. 1996), but a pair of recent decisions have required that an employer's proffered reasons be answered with proof of both discrimination and pretext. *Thomas v. Runyon*, 108 F.3d 957, 961 (8th Cir. 1997); *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64 (8th Cir. 1997).

The Second and Eleventh Circuits may be described as internally divided between the two pretext positions. The Second Circuit has shown a strong preference for "pretext-plus," holding in *Holt v. KMI-Continental, Inc.*, 95 F.3d 123, 129 (2nd Cir. 1996), that:

> [i]n order to survive a motion for summary judgment, at the third step plaintiff must put

> forth adequate evidence to support a rational finding that the legitimate non-discriminatory reasons proffered by the employer were false, and that more likely than not the employees' sex or race was the real reason for the discharge.

See also, Viola v. Philips Med. Sys. of N. A., 43 F.3d 712, 717 (2nd Cir. 1994). However, in *E.E.O.C. v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2nd Cir. 1994), it was held that summary judgment could be defeated by plaintiffs showing only that employer's proffered reasons were untrue. In light of the conflict, it would be appropriate to designate the Second Circuit as divided on the issue.

The Eleventh Circuit has also announced diverse positions. In *Isenbergh v. Knight-Rider Newspaper Sales, Inc.*, 97 F.3d 436, 440-43 (11th Cir. 1996), the court, sitting in Florida, held that *Hicks* did not support a "pretext only" rule and, therefore, more would be required of plaintiffs responding to motions for summary judgment. An Eleventh Circuit Court sitting in Alabama quickly responded with a lengthy criticism of the *Isenbergh* conclusions as being dicta inconsistent with both settled employment discrimination jurisprudence, including *Hicks*, and the well-established "pretext-only" rule of the Eleventh Circuit. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1527-38 (11th Cir. 1997).

Thus, as it is apparent that the law is unsettled as to the appropriate standard to be applied to cases of this nature, review of this issue by the Court plainly is warranted. In its opinion in *Wallace v. S.M.C. Pneumatics*, 103 F.3d 1394, 1396 (7th Cir. 1997), the court cited to a report entitled *Judicial Business of the United States Courts*: Report of the Director 1995, which noted that more than 90%

employment discrimination cases are disposed of without trial, many by summary judgment. The court commented further that in its estimation, the expanding federal caseload required judges to substitute summary judgment for trial. However, employment cases relying on the burden-shifting approach crafted in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973), present a basic conflict with the procedure under Fed. R. Civ. Proc. 56.

Under the indirect proof method, once a *prima facie* case is proven and the employer articulates its reason, the inquiry becomes one which focuses on whether or not the proffered reason is the truth, a conclusion not easily reached under the summary judgment analysis. Thus, it would be appropriate for this court to grant this petition and clarify the rules applicable to cases involving the burden-shifting proof analysis and Fed. R. Civ. Proc. 56.

In *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2142, 125 L.Ed. 2d 407 (1993), this court ruled that at trial, evidence that a defendant's proffered reason was false will permit a trier of fact to infer discrimination, but such a finding does not compel that result.

As noted above, that ruling gives guidance to courts at trial, but its application to the vast majority of cases disposed of by summary judgment is not clear. The question of what evidence is required to create a triable issue of fact as to pretext, and whether other evidence is required, has now been addressed across the circuits, with varying results. Plainly, this is an important issue that arises with great frequency. In these circumstances, review by this court is warranted.

B.

The Decision Below Is In Conflict With This Court's Decisions

This court has held that disposition without a trial is not appropriate in any case in which evidence exists that would support a reasonable jury's verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986).

This court has also established a method proof to be followed in employment cases based on the recognition that plaintiffs rarely ever have direct evidence of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817 (1973).

The opinion by the Circuit Court in this case went far beyond the boundaries established by this Court for Fed. R. Civ. Proc. 56, as the court not only identified some of the evidence of pretext produced by plaintiff, but it also resolved conflicts in that evidence and concluded issues of intent by resolving, or in some cases, ignoring questions of fact raised by the evidence.

In addition to stretching the boundaries of summary judgment, the opinion here adds an additional step to the burden-shifting formula adopted by this court, the presumption of non-discrimination. Such a result is at odds with this court's decisions and provides a basis to grant *certiorari* to review the disposition of this matter by the Seventh Circuit.

Initially, we would point out that in assessing the issue of pretext in this case, the court established a level of proof for Chiaramonte higher than that provided for

other age discrimination plaintiffs due to a "presumption of non-discrimination." In its opinion, the court wrote:

> In assessing whether Chiaramonte has met his burden of showing pretext, this Court must consider the presumption of non-discrimination that arises from the facts of this case. We have previously held that when an employee is hired and fired by the same decision-maker in a relatively short time span, a presumption, or inference, of non-discrimination arises. *See Our Lady of the Resurrection Med. Ctr.*, 77 F.3d at 152 (strong presumption of nondiscrimination where plaintiff hired and fired by same person in span of ten months).

(Appendix, pp. 14-15.)

Nothing in this court's opinion in *McDonnell Douglas v. Green*, or its most recent consideration of the indirect method of proof provides for review of cases with one standard for some plaintiffs, and another for those hired after age 40. *O'Connor v. Consolidated Coin Caterers*, 116 S.Ct. 1307, 517 U.S. 308 (1996). Certainly, the fact that an individual is hired and fired while in the protected category may be a defense to a claim of age discrimination. However, it is not a defense of such a nature that it entitles an employer to judgment as a matter of law, and certainly it should not change the manner in which evidence of pretext is weighed. Nonetheless, the Seventh Circuit held in this case:

> While Chiaramonte was first hired almost seven years prior to his termination, we find that Elting's affirmative act of retaining him after the merger suffices for the purposes of the presumption. *See Ragland v. Rock-Tenn Co.*, 955

> F.Supp. 1009, 1022-23 (N.D. Ill. 1997). It is highly doubtful that a person who hires an employee in the protected age group, and choose to retain that employee after a merger, would fire that same employee less than two years after the retention as a result of a sudden "aversion to older people." *Lowe v. J.B. Hunt Transp., Inc.*, 963 F.2d 173, 175 (8th Cir. 1992). Therefore, this Court will consider the presumption of non-discrimination in evaluating Chiaramonte's argument that FBG's proffered reasons for his termination are pretextual.

(Appendix, p. 16.) On that basis, Chiaramonte's efforts to prove pretext were measured on a scale that the Seventh Circuit "adjusted" for a presumption which increased his burden of proof.

If this court reviews the entire opinion contained in the appendix, it will be unable to answer the question, how old was Chiaramonte's replacement? The court made absolutely no mention of the fact that Whiting chose to replace a 59 year old with a 32 year old. This court has held that the fact that a replacement is substantially younger than the plaintiff is a reliable indicator of age discrimination. *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1310. Thus, we would argue that the presence of that fact alone was enough to counter-balance any presumption of non-discrimination and in fact should have created a presumption in favor of plaintiff against summary judgment. This entire argument would be unnecessary if the Seventh Circuit would have followed the burden-shifting method prescribed by this

court without adding presumptions and giving Chiaramonte a greater burden on the pretext issue than the law provides.

Besides saddling Chiaramonte with an extra burden of proof, the Seventh Circuit opinion demonstrates an approach under which no plaintiff could prevail. F.B.G.'s entire defense is based upon the economic justification of saving salary by replacing Chiaramonte with Cummins. If that reason was proven to be untrue, then this plaintiff had proof of a false reason for his termination, which could have been enough for a jury to conclude that discrimination motivated the discharge.

The Seventh Circuit noted two issues raised by plaintiff's evidence regarding the economic justification for Chiaramonte's firing.

First, an issue existed as a result of inconsistent statements made by Elting regarding Chiaramonte's termination and the reasons for that action. In 1992, Elting attended a fact-finding conference at the Illinois Department of Human Rights. When asked to speak to the issue of his reasons for terminating Chiaramonte, Elting said:

(1) Chiaramonte's work was continuing, but was performed by teams;

(2) Chiaramonte was not selected to work on a team based on synergy;

(3) Chiaramonte was not selected to remain on a team based on cultural differences; and

(4) Team members were selected based on the ability to crawl through the dirt by rebuilding the company.

In his response, Elting said nothing about economics or salary savings. At his deposition in this case, Elting was unable to recall anything he said at the fact-finding conference and offered no explanation for his omission of finances as a reason, or his interpretation of the above statements. Plaintiff argued that, at least, the above evidence and impeachment by omission created an issue of fact and, at best, it could provide direct evidence of age animus.

The Seventh Circuit failed to address the impeachment issue and discussed Elting's inconsistent statements by doing what Elting could not, interpreting them as age neutral. (Appendix, pp. 20-21.) We respectfully assert that nothing in Fed. R. Civ. Proc. 56 provides any basis to interpret statements as to their meaning, surely that is a task for a reasonable jury. Additionally, the impeachment of Elting provides a basis upon which a jury could conclude that the economic justification of Chiaramonte's salary was untrue, and thus pretextual.

Further evidence of pretext was provided by the fact that no salary savings was achieved by terminating Chiaramonte. In its opinion, the court noted:

> Chiaramonte then attempts to establish that the cost justification is pretext by showing that the terminations did not really save FBG much money. Additionally, Chiaramonte argues that the fact FBG retained management consultants at a cost of $1.5 million in the same month it terminated Chiaramonte for "cost-savings" shows that the cost justification was pretextual.

> This Court has established that it "does not sit as a super-personnel department that reexamines an entity's business decisions." *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986). Instead, our task is to determine "whether the employer gave an honest explanation of its behavior." *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560 (7th Cir. 1987).

(Appendix, pp. 16-17.)

The simple calculations required would demonstrate to a reasonable jury that F.B.G. saved nothing, and indeed spent more money after terminating plaintiff. This conclusion does not require the fact-finder to sit as a personnel department. The concept that even the most ridiculous and arbitrary decision is immune from being characterized as pretext effectively overrules this court's decision in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943 (1978). At the summary judgment stage, there is no need to sit as a personnel department, only to determine if there would be two sides to a personnel decision. Thus, the opinion of the Seventh Circuit failed to even consider plaintiff's most persuasive evidence.

The court also refused to consider that evidence, as calculations involved required taking into account actions taken *after* Chiaramonte was terminated, something the court refused to do, stating:

> Chiaramonte cannot rely on events that occurred after his layoff to dispute that *at the time of his termination, cost was an appropriate justification.*

(Appendix, p. 18.)

Why can't a plaintiff rely on events that occurred after his termination to prove that the reason given for the termination was false? Why should Chiaramonte be restrained from demonstrating that events prove Elting's statement to be untrue? Post-termination evidence proved pretext in *Gallo v. Prudential Residential Services*, 22 F.3d 1219 (2nd Cir. 1994). In that case, the employer terminated the plaintiff and her work, and then reinstated the work with a younger employee. Here, the younger employee continued with the work, but required expensive assistance.

The issue to be resolved was whether or not Chiaramonte's duties continued and if in fact F.B.G. saved money by having Cummins do them. How else to explain the choice between the two? If the duties continued, performed by a younger individual *at no costs savings*, then discrimination could be an appropriate conclusion. *Rose v. Wells Fargo Co.*, 902 F.2d 1417, 1421 (9th Cir. 1990). The evidence regarding Chiaramonte's replacement provided evidence of pretext which the court essentially refused to consider, and which clearly creates an issue upon which a reasonable jury could find for plaintiff.

In the Seventh Circuit, a plaintiff who has evidence of age-related comments regarding his discharge has evidence that in-and-of itself provides a "fighting chance" at trial. *Shager v. Upjohn*, 913 F.2d 398 (7th Cir. 1990), *also Hybert v. Hearst*, 900 F.2d 1050 (7th Cir. 1989). Chiaramonte provided such evidence in the statement of Singer. The Seventh Circuit excluded that evidence on the word of Elting that he alone made the decision, and Singer was not involved. The court ruled:

> We disagree with Chiaramonte's allocation of decision-making authority. The facts establish that Elting alone was responsible for Chiaramonte's termination. Elting stated in his deposition that he alone exercised the power to select the candidates for termination and to make the terminations. Chiaramonte has presented no evidence to dispute this finding.

(Appendix, p. 8.)

Again, as this was a summary judgment, the issue was whether or not an issue of fact existed as to Singer's involvement. The only evidence on that issue from Elting's deposition reads as follows:

> "The timing of that whole thing is very muddled in my head. I honestly don't know if I got into a deep discussion with him given the circumstances or not. I know it was discussed after he and Duane had this meeting, but I'm not sure if it was discussed before."

Based on that statement, how can it be said, as a matter of law, that Elting and Singer did not discuss the termination and Singer had no involvement or knowledge?

Plaintiff alleged that evidence of discrimination, as well as wilful discrimination, could be found by reasonable jury in Elting's actions on the date of his termination. At the meeting at which Elting advised Chiaramonte that he was terminated, he presented him with a document captioned "Severance Agreement," which contained a release. In opposition to the Motion for Summary Judgment Chiaramonte provided an affidavit which stated:

> "30. On the day that I was terminated, John Elting gave me a severance agreement and release which discussed among other issues my vacation pay. He told me that I had to sign the release (Pl. Ex. R) in order to receive my vacation pay."

Illinois has a wage payment statute, *Wage Payment and Collection Act*, 820 ILCS 115-5, which requires employers to pay accrued vacation pay at the time of separation of a terminated employee.

We argued to the Court that Elting knew Chiaramonte had been hospitalized in the Fall of 1991 and would of course be seeking any money available to him at the time of his termination. It was plaintiff's position that a reasonable jury could interpret the effort to illegally condition vacation pay on a waiver of age discrimination claims (which was itself invalid), as evidence of both discrimination and wilful discrimination. The Court rejected this argument noting that evidence of a release, without more, did not prove discrimination. The Court failed to even discuss the issue of the illegal condition precedent of the vacation pay in rejecting this evidence.

We would also note that not only did plaintiff produce evidence of Elting's impeachment with his own words, but that the Court was also provided with documents that it failed to even discuss. Elting maintained that he decided to fire Chiaramonte and keep Cummins in February or March of 1992. This testimony was directly impeached by an F.B.G. organizational chart prepared in July of 1991 from which Chiaramonte had vanished, and Cummins was listed as the head of engineering. This was

yet another piece of evidence, like Cummins' age, which was never even discussed by the Court.

Once F.B.G. proffered its purported loss of $6 million (depending on which affidavit is accepted), both the District Court and Seventh Circuit ceased to analyze or discuss the evidence. This opinion accepts financial justification for any termination decision, no matter what other evidence exists of pretext. It is precisely plaintiffs in Chiaramonte's position, older workers at risk in a reduction or "downsizing," who need the protection of the A.D.E.A.

This is a case in which an employer chose between a 32 year old with admitted abilities to do detail work and a 59 year old with an admitted wealth of talent. Surely, a rational jury would at least examine the issue of whether age motivated that choice.

Four other individuals who were terminated by Elting in the same reduction sue under the A.D.E.A. While the appeal in this case was pending, a Magistrate Judge issued an opinion granting summary judgment against two of the four plaintiffs in that case. In denying summary judgment against two plaintiffs, the Court reviewed the very same $6 million loss and noted that these two individuals, Sullivan and Raffe, had been replaced by younger employees, and there were issues as to exactly what amount was saved by their terminations. *Swanson v. Leggett & Platt*, No. 95 C 1074, ___ F.Supp. ___, 1996 WL 613158 (N.D. Ill.). While this decision does not provide precedent, it does demonstrate that issues of fact exist regarding Elting's consideration of age in his termination decisions which a judge believed required trial. This

opinion was provided to the Seventh Circuit, but it is not mentioned in the decision regarding Chiaramonte.

Surely, under an appropriate analysis under Fed. R. Civ. Proc. 56, the decision that no issue of fact exists must be premised on an analysis of all the evidence. Such an analysis did not occur here. If a Magistrate Judge found questions of fact, why wouldn't a reasonable jury?

In holding that no rational trier of fact could conclude Chiaramonte's age was a factor after reviewing the above evidence, the Seventh Circuit has set a standard, on summary judgment, that no plaintiff can overcome. F.B.G. allegedly saved $40,000 by terminating Chiaramonte, it could have saved $40,000 by terminating Cummins. A reasonable jury applying the *McDonnell Douglas* test and the principles of *Furnco Construction Co.* to this case could have found for plaintiff.

The decision of the Seventh Circuit is in conflict with this Court's decisions regarding the burden shifting method of proof and Summary Judgment. The question of the amount of proof required to create an issue of fact is of great practical importance to all employment litigation. This Court's guidance would assist Plaintiff's and Defendant's alike. A review of the decision below is clearly appropriate.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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In the

United States Court of Appeals

for the Seventh Circuit

No. 96-2987

NICHOLAS A. CHIARAMONTE,

Plaintiff-Appellant,

v.

FASHION BED GROUP, INC.,
a division of Leggett & Platt, Inc.

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 1448 – **Charles R. Norgle, Sr.,** *Judge.*

ARGUED APRIL 24, 1997 – DECIDED NOVEMBER 4, 1997

BEFORE EASTERBROOK, KANNE and EVANS, *Circuit Judges.*

KANNE, *Circuit Judge.* Nicholas A. Chiaramonte sued his former employer, Fashion Bed Group, Inc. ("FBG"), alleging that FBG improperly terminated him because of his age. FBG argued that it discharged Chiaramonte for financial reasons. The district court granted summary judgment in favor of FBG. The issue on appeal is whether Chiaramonte has presented evidence sufficient to withstand the summary judgment motion by showing that FBG's rationale for the termination was a pretext for age discrimination. Because we find that Chiaramonte failed

to demonstrate a genuine issue of material fact regarding pretext, we affirm the district court's grant of summary judgment.

I. History

FBG, a manufacturer of brass beds, engaged in a series of personnel reductions in 1991 and early 1992 that resulted in the termination of more than a third of the total FBG workforce. Chiaramonte lost his job in early 1992 in the last wave of these reductions.

Prior to his employment with FBG, Chiaramonte worked as a manager of engineering for Dresher, Inc. In 1985, when Chiaramonte was 52 years old, he joined Berkshire Furniture Co., Inc., in an equivalent position. John Elting, Berkshire's President, and Dick Singer, Berkshire's CEO, made the decision to hire Chiaramonte.

In 1988, Leggett & Platt, Inc. ("L & P") acquired Berkshire. L & P then also acquired Dresher and a third bed manufacturer, J.B. Ross. While L & P originally operated Berkshire, Dresher, and Ross as separate entities, L & P merged the three companies into a single company, FBG, in early 1991. Elting became President of the newly formed FBG, and Singer became CEO of the new company.

Elting selected the salaried employees that he thought FBG needed from the merged companies; the remaining employees were terminated. Elting appointed Chiaramonte to the position of Vice President of Engineering at FBG. Elting declined to hire the employee who

held Chiaramonte's position at Dresher. At that time Chiaramonte was 57 years old.

In late 1991, as a result of a change in manufacturing methods, Elting bifurcated the position of Vice President of Engineering. Elting appointed Chiaramonte to the position Vice President of Research and Development, while Rob Cummins, an employee originally hired by Chiaramonte while he was at Berkshire, was assigned to the Director of Engineering position. Chiaramonte's position enabled him to focus on questions of manufacturing method, while Cummins handled the mundane, day-to-day detail work.

FBG experienced financial difficulties after the merger. FBG suffered losses in all four quarters of 1991. By year-end, although FBG expected to earn a $3.6 million profit, FBG had lost $6.6 million. The losses, among other factors, precipitated a massive lay-off. In November and December 1991, FBG terminated nearly one-third of its total workforce. Most of these terminated employees were unionized hourly factory workers.

In the first two months of 1992, FBG lost another $900,000. Elting decided that further personnel reductions were in order. Because he felt FBG was "top-heavy" in management, Elting looked to the salaried employees for the next set of terminations, using the payroll register to determine who would be terminated. The register listed every employee at FBG, each employee's salary, and each employee's previous rate increases. It did not list age. Elting was the sole decision-maker regarding the salaried-employee terminations. He used three factors to determine which employee to terminate: salary, value to

FBG, and performance. Based on the first two of these criteria, Elting decided to terminate Chiaramonte, who was earning $73,000 per year at the time.

Elting selected twelve employees for termination. The ages of the employees ranged from thirty-two to sixty-one. Elting submitted the list of names to L & P's Personnel Department to ensure the terminations complied with applicable law. Thereafter, Elting personally terminated all twelve employees. Elting terminated Chiaramonte effective March 13, 1992, explaining that the termination was a result of the need to "downsize." Chiaramonte was 59 years old at the time of his termination.

After meeting with Elting regarding the termination, Chiaramonte spoke with Singer. When Chiaramonte asked Singer why he was being terminated, Singer gave three reasons: Chiaramonte's time off for illness, the fact that Elting was on "an ego trip," and, "Well, there's age." Singer denies making any such statement. Chiaramonte also alleges that prior to his termination, he was told by Debbie Lunn, a cost manager, that FBG was "going to get rid of all you old people." Lunn denies making that statement.

Several people took over Chiaramonte's duties after his termination. Among them was Cummins. Elting retained Cummins, while terminating Chiaramonte, because he believed Cummins was the type of "detail" person needed for the day-to-day operations, and Cummins' salary was significantly lower than Chiaramonte's salary. FBG also hired two additional workers in February 1993, who assumed some of Chiaramonte's former responsibilities.

In October 1992, the Illinois Department of Human Rights held a fact finding hearing regarding charges filed by Chiaramonte and others against FBG. At the hearing, Elting testified regarding the reasons for each termination. In reference to Chiaramonte's termination, Elting testified that he chose to terminate Chiaramonte because he lacked "team synergy," due to "cultural differences," and because Chiaramonte would be unwilling to "crawl through the dirt" in rebuilding the new company.

II. Analysis

A. Summary Judgment Standard

We review a district court's grant of summary judgment de novo, drawing our own conclusions of law and fact from the record before us. *See Thiele v. Norfolk & Western Ry. Co.*, 68 F.3d 179, 181 (7th Cir. 1995). Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, neither "the mere existence of *some* alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247 (emphasis in original), nor the existence of

"some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), is sufficient to defeat a motion for summary judgment.

B. Chiaramonte's ADEA Claim

Chiaramonte alleges that his termination was motivated by age animus. The ADEA prohibits employers from engaging in discrimination "because of [an] individual's age," 29 U.S.C. § 623(a)(1), though the prohibition is "limited to individuals who are at least 40 years of age." 29 U.S.C. § 631(a). The Supreme Court has interpreted this language to mean that the ADEA prohibits all discrimination based on age but limits the class of persons protected by the statute to those persons 40 years of age and older. *See O'Connor v. Consolidated Coin Caterers Corp.*, ___ U.S. ___, 116 S. Ct. 1307, 1310 (1996). To succeed in an ADEA claim, a plaintiff must establish that he would not have been terminated "but for" his employer's intentional age-based discrimination. *See Konowitz v. Schnadig Corp.*, 965 F.2d 230, 232 (7th Cir. 1992).

A plaintiff may prove age discrimination in two ways. "She may try to meet her burden head on by presenting direct or circumstantial evidence that age was the determining factor in her discharge. Or, as is more common, she may utilize the indirect, burden-shifting method of proof for Title VII cases originally set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), . . . and later adapted to age discrimination claims

under the ADEA." *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 371 (7th Cir. 1992) (quoting *Oxman v. WLS-TV*, 846 F.2d 448, 452 (7th Cir. 1988)).

1. The Direct Method of Proving Age Discrimination

Establishing discrimination by the direct method requires the plaintiff to produce evidence that the trier of fact can interpret as an acknowledgment of the employer's discriminatory intent. *See Hill v. Burrell Communications Group, Inc.*, 67 F.3d 665, 667 (7th Cir. 1995). Such evidence, therefore, "must relate to the motivation of the decisionmaker responsible for the contested decision." *Cheek v. Peabody Coal Co.*, 97 F.3d 200, 203 (7th Cir. 1996).

The parties take conflicting approaches in establishing whether there was any discriminatory intent in the decision to terminate Chiaramonte. FBG asserts that Elting was the sole decision-maker regarding Chiaramonte's termination. Thus any direct evidence Chiaramonte presents must relate to Elting's motivation for the firing. Chiaramonte, on the other hand, asserts that Elting was not the sole decision-maker. Therefore, Chiaramonte points to statements allegedly made by Dick Singer, FBG's CEO, and Debbie Lunn, a lower-level cost manager, to establish direct evidence of age discrimination. While Chiaramonte presents no evidence that Elting made statements supporting an inference of age animus, he argues that comments from other employees may be used to establish the discriminatory intent of FBG's management.

We disagree with Chiaramonte's allocation of decision-making authority. The facts establish that Elting alone was responsible for Chiaramonte's termination. Elting stated in his deposition that he alone exercised the power to select the candidates for termination and to make the terminations. Chiaramonte has presented no evidence to dispute this finding. The fact that Elting forwarded the list of potential terminations to L & P's Personnel Department does not suggest that Elting was not the sole decision-maker. Elting's list was not altered, amended, or otherwise adjusted as a result of this review. He simply ensured that his decisions complied with applicable laws. Additionally, Elting alone terminated each of the employees on the list.

Chiaramonte also argues that Elting discussed the terminations with Singer, and therefore, Elting was not acting alone. However, Chiaramonte provides no evidence supporting the contention that Singer had any decision-making responsibility with regard to the terminations. While Elting's deposition reflects uncertainty as to whether he discussed the terminations with Singer prior to their implementation, this ambiguity does not contradict Elting's statement that he had sole responsibility for the firings. *See Aungst v. Westinghouse Elec. Corp.*, 937 F.2d 1216, 1221 (7th Cir. 1991) (finding sole decision-maker despite fact that decision-maker consulted with others), *overruled in part on other grounds by Oxman v. WLS-TV*, 12 F.3d 652, 657 (7th Cir. 1993). In addition, Elting's uncertainty is resolved by Singer's unequivocal statement that he did not discuss the terminations with Elting prior to their occurrence.

Since Elting had sole responsibility for the terminations, any direct evidence supporting the discrimination claim must relate to his motivation for the terminations. The statements of Singer and Lunn offered by Chiaramonte fall far short of demonstrating age animus on Elting's part.

a. The Singer Statement

Chiaramonte alleges that after receiving his termination notice from Elting, he spoke with Singer. During that conversation, Chiaramonte asserts that Singer, in suggesting reasons for the firing, stated, "Well, there's age." Singer denies making any such statement, and Chiaramonte does not corroborate his recollection of the conversation. Additionally, Chiaramonte's own recollection was unclear; during his deposition testimony Chiaramonte stated that Singer said, "Age had to be a factor . . . but I don't know." Chiaramonte submitted no evidence suggesting that Singer would have knowledge of Elting's motivations for the terminations, and Singer's admission that he "didn't know" demonstrates that he was simply speculating as to Elting's motivations.[1] Singer was not the decision-maker, and his speculations do not provide a basis for charging Elting with discrimination. See *Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1155 (7th Cir. 1989). Statements by a non-decision-maker that amount

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[1] Additionally, Singer testified that he did not know of Chiaramonte's termination until informed by Chiaramonte or another FBG employee. If he was unaware of the termination itself, it is fair to assume he was also unaware of the reasons supporting the termination decision.

to mere speculation as to the thoughts of the decision-maker are irrelevant to our inquiry. Therefore, Singer's alleged statement does not provide the kind of "smoking gun" evidence required for a direct inference of discriminatory intent. *See Oxman*, 12 F.3d at 659-60 (rejecting as direct evidence statement of non-decision-maker); *Monaco v. Fuddruckers, Inc.*, 1 F.3d 658, 660 (7th Cir. 1993) (finding that plaintiff failed to show sufficient connection between statement of non-decision-maker and adverse employment decision to support case under direct method).

b. The Lunn Statement

Chiaramonte fares no better with the Lunn statement. Chiaramonte alleges that Debbie Lunn, who often socialized with Elting and others, stated that FBG was "going to get rid of all you old people." Lunn, like Singer, denies making such a statement. Even if such a statement was made, it has no probative value. Lunn is a lower-level cost supervisor who had no influence over personnel decisions. "Statements by inferior employees are not probative of an intent to discriminate by the decision-maker." *Aungst*, 937 F.2d at 1221; *see also Oxman*, 12 F.3d at 659-60. Chiaramonte has failed to show that the termination decision made by Elting had any connection whatsoever to the opinion of a lower-level employee. That Lunn socialized with Elting and Cummins does not serve to make her comments any more relevant. "[A]ctions and

comments by employees not involved in a discharge decision cannot provide a basis for charging other employees with discrimination." *Jardien*, 888 F.2d at 1155.[2]

2. Proving Age Discrimination by the Burden-Shifting Approach

Since Chiaramonte cannot defeat the summary judgment motion on the strength of the proffered direct evidence, he must establish a genuine issue of material fact under the burden-shifting approach. In order to prevail under the burden-shifting approach, a plaintiff must initially establish a prima facie case of discrimination. "[T]he prima facie case requires 'evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion. . . .' " *O'Connor*, ___ U.S. at ___, 116 S. Ct. at 1310 (quoting *Teamsters v. United States*, 431 U.S. 324, 358 (1977) (emphasis in *O'Connor* removed)). To establish such a case under the ADEA, Chiaramonte must show (1) he was in the protected age group of 40 or older, (2) he was performing his job satisfactorily, (3) he was discharged,

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[2] Although this Court has stated that this principle is not to be applied rigidly, especially in circumstances "where an employee who is outside the chain of decision nevertheless has valuable information bearing on the charge of discrimination," *Fortino v. Quasar, Co.*, 950 F.2d 389, 396 (7th Cir. 1991), we do not find that such circumstances exist in this case. Chiaramonte makes no connection between Lunn's alleged statement and Elting's motivation. His only argument is that they socialized together, so Lunn was in a position to know Elting's reasons. However, this is mere speculation and does not constitute the kind of "valuable information" we referred to in *Fortino*.

and (4) substantially younger, similarly-situated employees were treated more favorably.[3] *See id.* at 1310; *Maier v. Lucent Tech.*, 120 F.3d 730, 734 (7th Cir. 1997); *Denisi v. Dominick's Finer Foods, Inc.*, 99 F.3d 860, 864 (7th Cir. 1996).

A successful prima facie showing creates a presumption of discrimination that obligates the employer to produce a legitimate non-discriminatory reason for its decision. *See Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1122 (7th Cir. 1994). Production of this legitimate non-discriminatory reason rebuts this presumption of discrimination, *see Loyd v. Phillips Bros., Inc.*, 25 F.3d 518, 522 (7th Cir. 1994), shifting the burden back to the employee to show that the employer's stated reasons for its action are pretextual. *See Denisi*, 99 F.3d at 864.

A plaintiff can establish pretext by showing either that a discriminatory reason more likely motivated the employer or that the employer's explanation is unworthy of credence. *See Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1039 (7th Cir. 1993). Where defendants have proffered more than one reason for the dismissal, plaintiff must address *all* the reasons suggested by the defendants. *See Wolf v. Buss America, Inc.*, 77 F.3d 914, 923 (7th Cir. 1996), *cert. denied* ___ U.S. ___, 117 S. Ct. 175 (1996).

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[3] With regard to this last element, we note that the district court may have imposed a more stringent burden than was necessary under our precedent. However, this made little difference to the ultimate outcome in the district court because the district court, despite some question as to satisfaction of the last element, went on to analyze the case on the assumption that Chiaramonte established a prima facie case. Regardless, we review the record *de novo*.

Despite these shifting burdens of production, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). If the plaintiff is unable to meet this burden, his claim fails. *See Sarsha*, 3 F.3d at 1039.

The parties agree that Chiaramonte satisfies the first three requirements of the prima facie case. However, the parties present conflicting evidence regarding the fourth prong: whether a substantially younger, similarly-situated employee was treated more favorably. We need not resolve this dispute because we can decide this case on other issues. *See EEOC v. Our Lady of the Resurrection Med. Ctr.*, 77 F.3d 145, 149 (7th Cir. 1996) ("[T]his court may advance to an ultimate issue in a summary judgment analysis and consider the discrimination question notwithstanding a dispute over a fact necessary for a prima facie case."); *see also United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) ("Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant."); *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 135 (7th Cir. 1985) ("[T]he prima facie threshold is no longer a relevant issue once the defendant has come forward with evidence of legitimate reasons for its actions that would rebut a prima facie showing of discrimination."). Because we find that FBG has met its burden of articulating legitimate reasons for the discharge, we will proceed directly

to whether Chiaramonte has presented evidence sufficient to create a genuine issue of material fact with regard to pretext.

FBG presented two legitimate, non-discriminatory reasons for Chiaramonte's termination: (1) FBG's need to reduce operating costs, and (2) the fact that Chiaramonte's job was not essential to FBG's continued operations. *See Baxter Healthcare Corp.*, 13 F.3d at 1125-26 (Employer does not violate ADEA by terminating employees to reduce salary costs.). As noted above, the mere production of these reasons shifts the burden to Chiaramonte to prove that the stated reasons are simply pretext for age discrimination.

In assessing whether Chiaramonte has met his burden of showing pretext, this Court must consider the presumption of non-discrimination that arises from the facts of this case. We have previously held that when an employee is hired and fired by the same decision-maker in a relatively short time span, a presumption, or inference, of nondiscrimination arises. *See Our Lady of the Resurrection Med. Ctr.*, 77 F.3d at 152 (strong presumption of nondiscrimination where plaintiff hired and fired by same person in span of ten months); *Rand v. CF Indus. Inc.*, 42 F.3d 1139, 1147 (7th Cir. 1994) (finding inference of nondiscrimination where plaintiff "was hired while in the protected class, and fired by the same person who hired him after a relatively short period of time"); *see also Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991) ("[I]n cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference

exists that discrimination was not a determining factor for the adverse action taken by an employer.").

Elting hired Chiaramonte in 1985, when Chiaramonte was 52 years old and in the protected class. In 1991, L & P merged three subsidiaries, Berkshire, Dresher, and Ross, into a single entity: FBG. Following the mergers, FBG integrated the workforces of the three subsidiaries. Elting chose to retain Chiaramonte and appointed him Vice President of Engineering, while electing not to retain Chiaramonte's Dresher counterpart. Chiaramonte was 57 at that time. Less than two years later, Elting terminated Chiaramonte citing financial reasons.

Chiaramonte disputes the characterization of his "retention" after the merger, claiming that this was not an affirmative act on Elting's part because his Dresher counterpart resigned after the merger and did not seek employment with FBG. Additionally, Chiaramonte claims that Elting did not consider any other candidates for the position of Vice President of Engineering. First, we note that Elting testified that he chose Chiaramonte because he "felt Nick was superior to the gentleman that was in the Dresher position." Thus it is not clear that Elting did not consider other candidates for the position, and there is no evidence suggesting that Elting was under an obligation to retain Chiaramonte. Second, Chiaramonte may only speculate about the reason his Dresher counterpart did not affirmatively seek employment with FBG. It is possible that the Dresher employee saw the writing on the wall, knew that Elting felt Chiaramonte was a superior employee, and chose not to seek employment with FBG for that reason. In short, Chiaramonte has not given us sufficient reason to doubt that Elting affirmatively chose

to retain Chiaramonte in 1991, just two years prior to his termination.

While Chiaramonte was first hired almost seven years prior to his termination, we find that Elting's affirmative act of retaining him after the merger suffices for the purposes of the presumption. *See Ragland v. Rock-Tenn Co.*, 955 F. Supp. 1009, 1022-23 (N.D. Ill. 1997). It is highly doubtful that a person who hires an employee in the protected age group, and chooses to retain that employee after a merger, would fire that same employee less than two years after the retention as a result of a sudden "aversion to older people." *Lowe v. J.B. Hunt Transp., Inc.*, 963 F.2d 173, 175 (8th Cir. 1992). Therefore, this Court will consider the presumption of non-discrimination in evaluating Chiaramonte's argument that FBG's proffered reasons for his termination are pretextual.

FBG contends that its precarious financial situation justified Chiaramonte's termination.[4] In 1991, FBG expected to earn $3.6 million but lost $6.6. million. FBG

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[4] FBG gives a second reason for Chiaramonte's termination: his skills were not essential to the continuing operation of the business. Chiaramonte does not separately address this reason in his brief. The cost-savings and skills justifications are somewhat intertwined; when Elting made the decisions regarding terminations, he looked to candidates' salaries and the contribution their skills made to the company. In this sense the grounds are intertwined: both ultimately contributed to Elting's choice to terminate Chiaramonte. Chiaramonte had a high salary and his skills were not essential to the continuing needs of the business. Because Chiaramonte does not separately address this justification in his brief, we will treat the general arguments on the pretext issue as applying to both proffered justifications.

maintains that this loss precipitated the layoffs in 1992, when Chiaramonte was terminated. At the time he was terminated, Chiaramonte was salaried at $73,000 per year. FBG asserts that the personnel reductions in early 1992 (which included Chiaramonte as well as eleven other employees) saved FBG $750,000 in salary costs alone.

Chiaramonte first argues that an ambiguity exists over the actual losses sustained by the company that must be resolved by a jury. As evidence of this ambiguity, Chiaramonte points to a conflict between two affidavits, one which lists the losses as "operating losses," while the other lists the losses as "actual losses." We are not persuaded by this argument. First, as pointed out by the district court, the first affidavit, which described the losses as "actual losses," was unsigned and unsworn, and therefore not part of the record. *See Sellers v. Henman*, 41 F.3d 1100, 1101 (7th Cir. 1994). Thus there is no "ambiguity"; there is only one affidavit in the record. Second, even if the affidavit was part of the record below, we see no material issue that must be resolved by a jury. Whether the affidavit used the term "actual losses," or the more specific accounting term "operating losses" is of no moment; both describe $6.6 million in losses, which is a far cry from the $3.6 million FBG expected to earn in 1991.

Chiaramonte then attempts to establish that the cost justification is pretext by showing that the terminations did not really save FBG much money. Additionally, Chiaramonte argues that the fact FBG retained management consultants at a cost of $1.5 million in the same month it terminated Chiaramonte for "cost-savings" shows that the cost justification was pretextual.

This Court has established that it "does not sit as a super-personnel department that reexamines an entity's business decisions." *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986). Instead, our task is to determine "whether the employer gave an honest explanation of its behavior." *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560 (7th Cir. 1987).

We first note that Chiaramonte himself confirmed FBG's dire financial situation in 1991. According to Chiaramonte, FBG was "dying" financially because it had "too many people, too much product, too much everything." In fact, Chiaramonte admits that FBG needed to downsize because it had "two people in every slot." Chiaramonte's assault on the financial justification accordingly does not focus on the 1991 time period, but instead focuses on events that occurred at FBG after his termination. Specifically, Chiaramonte argues that the pay increases given to Cummins, as well as the salaries of two workers hired in February 1993[5] resulted in a $114,000 expenditure to achieve the same work Chiaramonte did for $73,000. We agree with the district court's analysis on this point. Chiaramonte cannot rely on events that occurred after his layoff to dispute that *at the time of his termination* cost was an appropriate justification. Indeed, as the district court noted, "[i]f the court were to accept Chiaramonte's argument, it would in effect have to hold that an inference of discrimination forms when a company that, at one time, was forced to 'downsize' for financial reasons, subsequently hires additional

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[5] Chiaramonte fails to note that the two employees hired in 1993, ten months after his termination, were both 56 years old.

employees and gives salary raises to employees it chose not to terminate." *Chiaramonte v. Fashion Bed Group, Inc.*, 932 F. Supp. 1080, 1092 n.5 (N.D. Ill. 1996).

Chiaramonte also attempts to establish pretext by noting that FBG hired management consultants, at a considerable cost, in the same month that it terminated Chiaramonte. This is the kind of business decision that is best left to management, without second-guessing by the judiciary. That FBG tried to improve its situation by employing management consultants does not undermine the contention that FBG was "dying" financially. A contrary decision by this Court would create a presumption of discrimination whenever a company expended resources in an attempt to increase profitability in a time of financial hardship. We decline to take such a step. FBG's management has the discretion to determine how and where to achieve necessary cost savings; our job is simply to ensure that the decisions management made did not turn on prohibited grounds. Based on the foregoing, we find that Chiaramonte has not presented sufficient evidence to create a genuine issue of material fact regarding FBG's claim of financial hardship.

Although we find that there is no genuine issue of material fact regarding FBG's financial situation, Chiaramonte may still prove pretext by showing that the proffered reasons did not actually motivate his discharge. *See Cliff v. Board of Sch. Comm'rs*, 42 F.3d 403, 412 (7th Cir. 1994). Chiaramonte relies on three pieces of evidence to establish this: (1) alleged inconsistency between Elting's testimony before the Illinois Department of Human Rights ("IDHR") and his deposition testimony,

(2) Singer's alleged statement to Chiaramonte after Chiaramonte informed him of the termination, and (3) Lunn's alleged statement.

During the IDHR fact finding conference, Elting gave the following reasons for Chiaramonte's termination: Chiaramonte was unable to "crawl through the dirt while rebuilding the company," there were "cultural differences in the organization," and Chiaramonte did not possess "team synergy." First, Chiaramonte argues that these are comments on his age. Second, he claims that Elting's failure to cite financial reasons for the discharge shows that the cost-savings justification Elting articulated in his deposition testimony is pretextual. We do not agree with either of Chiaramonte's assertions.

First, these statements are a far cry from the kind of statements we have found to be probative of age discrimination. *See, e.g., McNeil v. Economics Lab., Inc.*, 800 F.2d 111, 115 n.3 (7th Cir. 1986) (references to "over-paid and under-motivated veterans," the company's plan to replace "old-timers" with "bright young people fresh out of college," and statement that "old pros" were "just old," support inference of age discrimination), *overruled in part on other grounds by Coston v. Plitt Theatres, Inc.*, 860 F.2d 834 (7th Cir. 1988). Elting's statements are more similar to the statements in *Mills v. First Federal Savings & Loan Assoc.*, 83 F.3d 833 (7th Cir. 1996), that we found were not sufficient to support a claim of age discrimination. In *Mills*, the plaintiff was told that management was "out to get rid of [her]" because there was the "concern that [she] may not be able to keep up with the [accounting] regulations." *Id.* at 841. While the plaintiff in *Mills* "took this to mean it was because of [her] age," *id.*, we emphasized

that a plaintiff's subjective interpretation of her employer's statements is not controlling. "[I]f the subjective beliefs of plaintiffs in employment discrimination cases could, by themselves, create genuine issues of material fact, then virtually all defense motions for summary judgment in such cases would be doomed." *Id.* at 841-42 (citing *Visser v. Packer Eng'g Assocs.*, 924 F.2d 655, 659 (7th Cir. 1991)). The instant facts are parallel. Even though Chiaramonte believes that Elting's comments are age-related, his interpretation is not controlling. We find that Elting's statements before the IDHR do not evidence age animus, and in fact are consistent with Elting's decision to retain the "nuts and bolts, the people who were responsible to get detail done."

We also note that Elting's deposition testimony is entirely consistent with the statement he gave to the IDHR. Elting testified that in making the determinations regarding terminations, he looked at salary level, value to FBG, and performance. Whether an employee would be willing to "crawl through the dirt" or work with a "team" are factors that affect an employee's value to FBG. After determining that Chiaramonte did not possess these qualities, Elting concluded that his contribution to FBG was incommensurate with his salary, and therefore he was eligible for termination. That the need for *any* terminations was prompted by financial concerns does not make the justifications as to why *this particular employee* was terminated inconsistent with that concern. Thus, Elting could consistently state that financial concerns prompted the terminations, but it was Chiaramonte's lack of "team synergy," his unwillingness to "crawl through the dirt," and his incompatibility with firm "culture" that made

him a strong candidate for termination. As such, we find no merit in Chiaramonte's contention that an alleged inconsistency between Elting's statements before the IDHR and his trial testimony supports an inference that FBG's reasons for his termination were pretextual.

With regard to Chiaramonte's second and third pieces of evidence to show pretext, they are similarly unpersuasive. Chiaramonte argues that Singer's and Lunn's alleged statements create a genuine issue of material fact in regard to the question of pretext. In discussing Chiaramonte's direct case, we found these statements were not probative of discrimination. Under the same reasoning, we now find they are also insufficient to create a material issue on the question of pretext. Singer was not a decision-maker and was clearly speculating as to the reasons Elting terminated Chiaramonte. As such, his statement that "Age had to be a factor . . . but I don't know" does not create an issue that requires a trial. Lunn's alleged statement also does not create a material issue; as a lower-level employee she had no control over the termination decision. The fact that she socialized with Elting, among others, does not suggest that she was in such a place of trust and confidence that she would be privy to Elting's motives. Thus the Singer and Lunn statements do not create a material issue on the question of pretext.

We find, therefore, after a review of all the evidence, that Chiaramonte has failed to establish a genuine issue of material fact as to whether FBG's proffered reasons for his dismissal were pretextual. This is particularly true in light of the presumption of non-discrimination created by the facts of this case. However, before we may affirm the

district court's grant of summary judgment, we must examine plaintiff's final argument.

3. Chiaramonte's Claim That FBG Willfully Violated the ADEA

Chiaramonte alleges that the improper release form FBG asked Chiaramonte to sign is direct evidence of willful discrimination.[6] To establish a willful violation of the ADEA, Chiaramonte must show either FBG knew its decision to terminate Chiaramonte violated the ADEA, or "showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Trans World Airlines v. Thurston*, 469 U.S. 111, 128 (1985) (quoting *Trans World Airlines v. Thurston*, 713 F.2d 940, 956 (2d Cir. 1983)). Elting was the sole decision-maker, so Chiaramonte must show that Elting either knew his decision violated the ADEA, or he intended recklessly to flaunt the requirements of the ADEA. There is no evidence from which the jury could conclude that either state of mind existed. In fact, the evidence submitted to the court tends to show exactly the opposite – that Elting sought the approval of L & P's Personnel Department to ensure that the terminations did not violate any applicable laws. In addition, even if the release was improper under the

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[6] Chiaramonte asserts that the release form is invalid and unenforceable under the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f)(1). The district court agreed with him, but found that the release did not constitute evidence of discrimination. The question of the validity of the release is not properly before us on appeal; however for the purposes of decision, we will assume, without deciding, that the release violates OWBPA.

OWBPA, there is no precedent in this Circuit establishing that an improper release is evidence of willful discrimination. Therefore, given that the evidence shows that Elting went out of his way to ensure legality and the fact that this Circuit has found that releases, without more, at the most constitute "innocuous evidence of age awareness," *Partington v. Broyhill Furniture Indus.*, 999 F.2d 269, 271 (7th Cir. 1993) (stating that no inference of guilt may be drawn from fact employer asked older terminated worker to sign release); *see also Courtney v. Biosound, Inc.*, 42 F.3d 414, 420 (7th Cir. 1994) (same), we find no genuine issue of material fact regarding Chiaramonte's claim for willful violation of the ADEA.

Chiaramonte has not demonstrated the existence of a genuine issue of material fact with respect to his claim that he was terminated in violation of the ADEA. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita*, 475 U.S. at 587 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). Therefore we AFFIRM the district court's grant of summary judgment in favor of FBG.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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Supreme Court, U.S.
FILED

No. 97 1294 FEB 2 1998

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In The

Supreme Court of the United States

October Term, 1997

NICHOLAS A. CHIARAMONTE,

Petitioner,

v.

FASHION BED GROUP, INC.,
a division of LEGGETT & PLATT, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NICHOLAS A. CHIARAMONTE, Plaintiff, v. FASHION BED GROUP, INC., a Division of LEGGETT & PLATT, INC., Defendant.	)	No. 95 C 1448 HONORABLE CHARLES R. NORGLE

OPINION AND ORDER

CHARLES R. NORGLE, SR., District Judge:

Before the court is Defendant Fashion Bed Group, Inc.'s motion for summary judgment. For the following reasons, the motion is granted.

I.

Plaintiff Nicholas A. Chiaramonte ("Chiaramonte") contends that FBG fired him because of his age.[1] Chiaramonte was born on November 29, 1932. He worked as a manager of engineering for a bed and home furnishing manufacturer, Dresher, Inc. ("Dresher"), from 1976 to 1985. In 1985, when Chiaramonte was fifty-two years old,

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[1] The court derives the following facts from the parties' Statements of Material Facts filed pursuant to Local Rules 12(M) and 12(N). The court recognizes both parties' strict compliance with the oft-overlooked and oft-disobeyed rules.

he voluntarily left Dresher to work for its direct competitor, Berkshire Furniture Co., Inc. ("Berkshire"). John Elting ("Elting"), the President of Berkshire, and Dick Singer ("Singer"), the Chief Executive Officer of Berkshire, made the decision to hire Chiaramonte. Chiaramonte eventually became Bershire's Vice President of Engineering.

Leggett and Platt, Inc. ("L&P"), FBG's parent company, acquired Bershire in 1988. After the acquisition, Bershire, as a wholly-owned subsidiary of L&P, acquired another bed manufacturer, J.B. Ross ("Ross"). L&P also acquired Dresher, Chiaramonte's former employer, in 1990. L&P operated Bershire, Dresher and Ross as separate entities until 1991, when L&P merged the operations of all three entities into a single entity operating under the name Fashion Bed Group ("FBG"). The Bershire management staff headed FBG; Elting and Singer remained as President of CEO, respectively, of FBG.

Following the mergers, FBR integrated the workforces of Bershire, Dresher, and Ross. FBG President Elting personally selected which salaried employees from Dresher and Bershire would be retained. In 1990, Elting terminated many employees, but appointed Chiaramonte as FBG's Vice President of Engineering and elected not to hire the Dresher employee who held the parallel position. Elting promoted Chiaramonte, who was then fifty-seven years of age.

Beginning of July 1990, Chiaramonte played a "key role" in the absorption of Dresher's equipment into Bershire's manufacturing plants. Chiaramonte and Elting both began exploring new manufacturing methods for

use in their plants. After research and investigation, Elting decided to implement one method at various FBG plants. As a result of the method change, Elting also changed the responsibilities of Chiaramonte and another coworker. Elting split the Vice President of Engineering position (once held by Chiaramonte) in half: Elting named Chiaramontes Vice President of Research and Development, thus relieving Chiaramonte of his responsibility for "mundane detail and day-to-day things," and assigned the rest of the position to Rob Cummins ("Cummins"), whom Chiaramonte originally hired at Bershire, to the Director of Engineering position. Chiaramonte continued to report directly to Elting, while Cummins was to report to the Vice President of Operations, a position at the same organizational level to that of Chiaramonte's. However, at that time, the Vice President of Operations position was vacant and, as a result, Cummins reported directly to Elting.

Elting explains his decision to eliminate Chiaramonte's old position and create the two new jobs by stating that Chiaramonte would "flourish [at the new position] instead of getting bogged down in trying to figure out a lot of detail stuff." Instead, with the division of responsibilities, Chiaramonte could focus on the "work . . . he did best; and that was on the continuing process of trying to get [FBG] into [the new method of manufacturing]."

FBG's financial records, including its general ledger, financial statements, balance sheets, and other accounting information, reveal that its sales and profits were much lower than originally expected. In 1991, FBG's sales were

$8.5 million lower than anticipated. Moreover, FBG operated at a $6.6 million loss, $10.2 million less than the forecasted operating income of $3.6 million. These losses were attributed to problems in distribution, production planning, manufacturing operations, administrative support, and customer service. FBG received more orders than it could fill; as Elting put it, FBG was like a "runaway train." Chiaramonte offers nothing to dispute these facts.

Changes in the brass bed market further compounded FBG's internal problems. Customer preferences began to shift away from the high cost genuine brass beds manufactured by FBG towards lower cost plated brass or painted color beds. Additionally, foreign competitors began importing lower cost beds in direct competition with FBG. The problems resulted in several large customers either rescinding or reducing their orders. In an effort to guarantee that it could meet each order, and to prevent the steady erosion of customers, FBG utilized the "brute force" method: hire more employees to meet customers' orders and worry "what to do with all the employees later." The "later" was November 1991; the "what to do with all the employees" was reduce the FBG workforce.

In November and December 1991, FBG set out to reduce its total workforce by a third. FBG decided to terminate 227 of its 679 employees. Of the 227 total layoffs, 190 were unionized hourly factory workers and the other thirty-seven were non-union employees. Of the thirty-seven non-union employees, eight were salaried workers whose ages ranged from sixty-six to twenty-six.

After the late 1991 reductions in force, Elting believed that FBG was "top-heavy" in management. Chiaramonte agrees; in late 1991, according to Chiaramonte, FBG was "dying" financially because FBG had "too many people, too much product, too much everything." FBG lost another $900,000 in the first two months of 1992. Faced with a top-heavy management structure and the company's serious financial trouble, once again, FBG needed to "downsize." Chiaramonte testified that this need was "very obvious" because FBG "had two people in every slot." Recognizing the obvious need for force reduction, Chiaramonte "thought his job was secure," however.

Unfortunately for Chiaramonte, he thought wrong. Elting made the decision to terminate additional employees, including twelve salaried professionals. Elting realized that eliminating salaried positions would result in losing skills and talents other employees did not have. However, those skills and talents were, according to Elting, "a luxury [FBG] could not afford . . . [FBG] was in a do or die situation." In Elting's words, "[FBG was] out of time . . . [FBG] had no luxuries to afford any extra costs."

In selecting the employees that he would terminate, Elting reviewed FBG's payroll register. The register listed every employee at FBG, in addition to each employee's salary and their previous rate increases. The register did not include the employees' dates of birth. Elting took the register home and, while sitting at his kitchen table, created a list of twelve employees that would eventually be terminated. Elting stated that he looked at three factors when determining which employee to terminate: the

employee's salary, performance, and value to FBG. Age was not a factor. At the time Elting assembled the list, Chiaramonte's salary was $73,000 per year, while Cummins' salary was $35,440 per year. Elting then submitted the list of twelve employees to FBG's corporate staff and L&P's legal staff. While Elting had authority to terminate employees without approval from L&P management officials, Elting discussed his evaluations with L&P's Senior Vice President before implementing his decisions. Thereafter, Elting terminated all twelve of the employees on this list. Those terminated ranged in ages from sixty-one to thirty-two. Chiaramonte was among the names on that list. As of March 13, 1992, Chiaramonte was terminated from employment at FBG. He was fifty-nine years old.

Elting alone made the decision to terminate Chiaramonte. Both Elting and Singer testified that Elting was the sole decision-maker with regard to the twelve management layoffs. Chiaramonte submitted no evidence to dispute their testimony. In addition, FBG produced memoranda regarding employee personnel changes. All such memoranda were authored and distributed by Elting. The CEO of FBG, Singer, had no involvement in that decision. In fact, Singer's daughter, Candace Singer, was also terminated by Elting on March 13, 1992. Elting testified by deposition that the first and third factors were at issue in Chiaramonte's termination. Neither Chiaramonte's performance nor his health history were factors. Chiaramonte carried a "huge salary" and had a "wealth of talent that [FBG] could get by without." (After Chiaramonte's termination, Elting wrote a letter of reference indicating that Chiaramonte's "strong work ethic and vast knowledge in combination with his creative abilities should

make him a valuable addition to any organization.") Elting notified Chiaramonte of the termination in person and told Chiaramonte that "downsizing" was the reason for it.

After Chiaramonte's termination, Elting eliminated the Vice President of Research and Development position and divided the duties among several people. Among the people acquiring some of Chiaramonte's former duties was Cummins. Elting chose not to terminate Cummins because Cummins (1) was detail-oriented, a quality necessary to FBG's engineering department, and (2) had a salary much lower than Chiaramonte.

II.

Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *GCIU Employer Retirement Fund v. Chicago Tribune Co.*, 66 F.3d 862, 864 (7th Cir. 1995). When considering a motion for summary judgment, the court may review the entire record, drawing all reasonable inferences from the record in the light most favorable to the non-moving party. *Cornfield by Lewis v. School Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir. 1993). The burden of establishing the lack of any genuine issue of material fact rests with the movant. *Jakubiec v. Cities Serv. Co.*, 884 F.2d 470, 473 (7th Cir. 1988).

The nonmovant, however, must make a showing sufficient to establish any essential element for which it will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The non-moving party cannot

rest on the pleadings alone, but must identify specific facts which establish that there is a genuine triable issue. *Cornfield*, 991 F.2d at 1320. The nonmovant must do more than simply "show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). It is not sufficient to show evidence of purportedly disputed facts if those facts are not plausible in light of the entire record. *Corey v. Canada, Inc.*, 950 F.2d 481, 485 (7th Cir. 1991); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 476-77 (7th Cir. 1988). Motions for summary judgment in employment discrimination cases "must be decided with particular care, given the extent to which the merits often turn on questions of credibility and intent." *Veprinsky v. Daniel, Inc.*, No. 95-2197, 1996 WL 348212, *13 (7th Cir. June 26, 1996).

It is well-established that an employee may be terminated for "any reason, good or bad, or for no reason at all, as long as the employer's reason is not proscribed by a Congressional statute." *Kahn v. U.S. Sec. of Labor*, 64 F.3d 271, 279 (7th Cir. 1995). The Age Discrimination in Employment Act ("ADEA") is an example of such a proscriptive statute. The ADEA[2] makes it unlawful for employers to engage in the following conduct:

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[2] Congress enacted the ADEA primarily to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). "The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the work place, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a). The protections under ADEA extend only to those who have attained the age of forty or older. 29 U.S.C. § 631(a); *Collier v. The Budd Co.*, 66 F.3d 886, 889 n.2 (7th Cir. 1995).

In proving age discrimination, Chiaramonte may either present direct evidence of discrimination or follow the burden-shifting method set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). *See Sample v. Aldi Inc.*, 61 F.3d 544, 547 (7th Cir. 1995). Chiaramonte has not provided direct "smoking gun" evidence of discrimination; thus, he must rely on the burden-shifting method.

The United States Supreme Court recently altered the elements of a *prima facie* case with regard to the ADEA. *See O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996). The Supreme Court held that an ADEA plaintiff need not show that he or she was replaced by a

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statutory scheme to protect employees in the work place nationwide." *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 881 (1995).

person outside of the protected "over forty" class as part of a *prima facie* ADEA case. While the Court specifically limited its review to non-reduction-in-force cases, *O'Connor*, 116 S. Ct. at 1309 n.1, this court finds *O'Connor* to have relevant bearing on reduction-in-force ("RIF") *prima facie* cases.

The Seventh Circuit's most recent RIF case listed the fourth of four elements of a RIF *prima facie* case as: "(iv) [proving] that others not in the protected class were treated more favorably. The employees who were more favorably treated must have been situated similarly to the plaintiff." *Smith v. Cook County*, 74 F.3d 829, 831 (7th Cir. 1996) (citations omitted). Yet, in contrast, United States Supreme Court Justice Scalia wrote for the unanimous Court:

> As the very name "prima facie case" suggests, *there must be at least a logical connection between each element of the prime facie case and the illegal discrimination* for which it establishes a "legally mandatory, rebuttable presumption," *Burdine, supra*, at 254, n. 7, 101 S.Ct., at 1094, n. 7. The element of replacement by someone under 40 fails this requirement. The discrimination prohibited by the ADEA is discrimination "because of [an] individual's age," 29 U.S.C. § 623 (a) (1), though the prohibition is "limited to individuals who are at least 40 years of age," § 631(a). *This language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age*, but limits the protected class to those who are 40 or older. *The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant*, so long as he has

lost out because of his age. Or to put the point more concretely, there can be no greater inference of age discrimination (as opposed to "40 or more" discrimination) when a 40 year-old is replaced by a 39 year-old than when a 56 year-old is replaced by a 40 year-old. Because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the McDonnell Douglas prima facie case. Perhaps some courts have been induced to adopt the principle urged by respondent in order to avoid creating a prima facie case on the basis of very thin evidence – for example, the replacement of a 68 year-old by a 65 year-old. While the respondent's principle theoretically permits such thin evidence (consider the example above of a 40 year-old replaced by a 39 year-old), as a practical matter it will rarely do so, since the vast majority of age-discrimination claims come from older employees. In our view, however, *the proper solution to the problem lies not in making an utterly irrelevant factor an element of the prima facie case, but rather in recognizing that the prima facie case requires "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion. . . . " Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 866, 52 L.Ed.2d 396 (1977) (emphasis added). In the age-discrimination context, *such an inference can not be drawn from the replacement of one worker with another worker insignificantly younger.* Because the ADEA prohibits discrimination on the basis of age and not class membership, *the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age*

> *discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.*

O'Connor, 116 S. Ct. at 1310 (emphasis added). Respectfully, there can be no doubt that the Seventh Circuit's fourth *prima facie* element is now passé in age discrimination law. Indeed, the Seventh Circuit recently recognized,

> After *O'Connor*, statements in decisions such as *Sample v. Aldi, Inc.*, 61 F.3d 544, 548 (7th Cir. 1995), and *Hill v. Burrell Communications Group, Inc.*, 67 F.3d 665, 668 (7th Cir. 1995), to the effect that the plaintiff must show that his replacement is of a different race (sex, etc.), cannot be considered authoritative. The question instead is whether the plaintiff has established a logical reason to believe that the decision rests on a legally forbidden ground. That one's replacement is of another race, sex, or age may help to raise an inference of discrimination, but it is neither a sufficient nor a necessary condition.

Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996).

Reading *O'Connor* and *Carson* together, the court finds that the fourth RIF *prima facie* prong in *Smith* is an insignificant factors and should be replaced. In its stead, the Supreme Court and Seventh Circuit require "evidence adequate to create an inference that an employment decision [–in an age discrimination RIF case, that the employer decided to retain another similarly-situated employee–] was based on a[n] [illegal] discriminatory criterion." *O'Connor*, 116 S.Ct. at 1310. In other words, in order to satisfy the fourth prong, a plaintiff should plead "a logical reason to believe that the decision [to terminate the plaintiff but retain another similarly-situated co-

worker] rests on a legally forbidden ground." *Carson*, 82 F.3d at 159.

Thus, taking the age discrimination standard as altered by *O'Connor*, and merging the standard with the Seventh Circuit's *prima facie* case (modified for "reduction in force" cases), Chiaramonte must demonstrate that: (1) he was forty or older; (2) he was performing according to his employer's legitimate expectations; (3) he was terminated; and (4) evidence exists which creates an inference that his termination sprang from the "legally forbidden ground" of age discrimination. To satisfy the "sufficient evidence" fourth prong, Chiaramonte must show a "logical, but discriminatory, connection" between his age, the defendant's decision to terminate him, and the defendant's decision to retain a similarly-situated co-employee.[3]

Once Chiaramonte establishes a *prima facie* case, a rebuttable presumption is created: that FBG's decision not to promote Chiaramonte was based on the "consideration of impermissible factors." *See Deluca v. Winer Indus.*, 53 F.3d 793, 797 (7th Cir. 1995). The burden of production [–not proof–] then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action." *Servidas v. Commonwealth Edison Co.*, 60 F.3d 375, 377-78 (7th

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[3] While no all-inclusive list of "inference-creating" evidence exists, the Supreme Court did mention one piece of evidence that would create such an inference: "the fact that a [retained similarly-situated employee] is substantially younger than the plaintiff." *O'Connor*, 116 S. Ct. at 1310. However, the Court specifically held irrelevant the fact that the chosen retainee was outside the protected class does not. *Id.*

Cir. 1995). "If a legitimate explanation is provided, the presumption of discrimination dissolves, and the burden shifts back to the plaintiff to show that the employer's proffered reasons are a pretext for age discrimination." *Id.* at 378. "Pretext . . . means a lie, specifically a phony reason for some action." *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995). Thus, the ultimate burden of persuasion rests with, and never shifts from, the plaintiff at every point in the litigation process. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2748-49 (1993).[4] Chiaramonte must prove that his position would not have been eliminated "but for" FBG's motive to discriminate against him because of his age. *Karazanos v. Navistar Int'l Trans. Corp.*, 948 F.2d 332, 335 (7th Cir. 1991) (quoting *LaMontagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984)); *see also Aungst v. Westinghouse Elec. Corp.*, 937 F.2d 1216, 1219 (7th Cir. 1991).

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[4] As observed by Judge Posner in *Russell v. Acme-Evans Co. et al.*, 51 F.3d 64, 70 (7th Cir. 1995), the court recognizes that this asymmetrical burden places discrimination plaintiffs at a disadvantage. This disadvantage may be particularly poignant where, as here, the plaintiff faces a highly-funded opponent.

As in *Russell*, this court does *not* find that FBG did not discriminate against Chiaramonte; rather, it finds that Chiaramonte has failed to present sufficient evidence to defeat the motion. *See id.* Still, as noted in *Russell*:

> [T]here is nothing within our power . . . that would lighten the burden of the employee without depriving the employer of procedural rights conferred upon him by settled law. And these procedural rights are not to be thought merely irksome obstacles to truth and justice. They are necessary to distinguish the real from the spurious cases of discrimination.

Id. at 71.

III.

A. Prima Facie Case

Turning to the merits of the case, the court addresses only those FBG and Chiaramonte arguments that directly relate to the *prima facie* case discussed previously in this Opinion and Order. FBG contends that Chiaramonte failed to establish the fourth prong of the *prima facie* case. (Chiaramonte clearly established the first three prongs: he was fifty-nine at termination; according to Elting, he performed at a more-than appropriate level throughout his employment; and he was terminated.) FBG argues first that Chiaramonte did not prove that substantially younger, but otherwise similarly-situated, co-workers were treated more favorably. Thus, taking FBG's argument and fitting it into the new *prima facie* framework, FBG essentially argues that Chiaramonte has not provided enough evidence to create an inference of age discrimination. Yet, Chiaramonte counters that Cummins was a similarly-situated employee who was reassigned to perform the responsibilities and duties previously-performed by Chiaramonte. In support, Chiaramonte offers two memoranda authored by Elting, one dated September 9, 1991, and the other dated March 13, 1992, the date of Chiaramonte's discharge. The court finds that the memos do show that, while it is undisputed that Cummins was over twenty years younger than Chiaramonte as of the date of Chiaramonte's termination, a genuine issue of material fact exists as to whether Cummins was an otherwise similarly-situated employee. Both Cummins and Chiaramonte were engineers employed as managers in the top echelon of the company. Cummins was only one step lower in the engineer "chain of command" and,

like Chiaramonte, reported directly to Elting. Yet, FBG chose to terminate Chiaramonte's position and keep Cummins' position. This evidence, which includes evidence that FBG chose to retain an arguable similarly-situated co-worker "significantly" and "substantially younger than the plaintiff is . . . a . . . reliable indicator of age discrimination," *O'Connor*, 116 S. Ct. at 1310, and thus Chiaramonte has provided "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion." *Teamsters v. United States*, 431 U.S. 324, 358 (1977). Accordingly, the court finds that Chiaramonte properly established a *prima facie* case of age discrimination.

B. FBG's Reasons For Terminating Chiaramonte

FBG articulated a legitimate, non-discriminatory reason for terminating Chiaramonte: FBG was forced to terminate first 227 persons and later twelve employees for business reasons, and Elting picked Chiaramonte as one of those twelve because of Chiaramonte's (1) "huge salary" and (2) "wealth of talent that [FBG] could get by without." FBG met its burden of production; the burden of proof now shifts to Chiaramonte to show that the reason was a subterfuge for age discrimination.

C. Pretext

1. Presumption of Nondiscrimination

Prior to addressing whether Chiaramonte has met his burden of proof and will withstand the instant motion for summary judgment, the court notes that the instant facts give rise to an inference that discrimination was *not* a

factor in terminating Chiaramonte. When the same person hires and fires a plaintiff, an inference of nondiscrimination is created. *EEOC v. Our Lady of the Resurrection Medical Ctr.*, 77 F.3d 145, 152 (7th Cir. 1996). "The same hirer/firer inference has strong presumptive value." *Id.* The facts in the case *sub judice* establish that Elting hired Chiaramonte at fifty-two years of age. When Elting had to make the decision regarding who he wanted to "head up" FBG's engineering department, he chose Chiaramonte, even though Chiaramonte was fifty-seven.

Chiaramonte takes issue with FBG's statement that Elting decided to "keep" him as the top engineer at FBG. Since Elting did not interview any other Vice President of Engineering candidates, Chiaramonte argues, no such "decision" was made. Yet, this argument is flawed. Since Elting believed Chiaramonte to be qualified for the Vice President of Engineering position, interviewing additional applicants would be futile; Chiaramonte was the best person for the job at that time and Elting made an affirmative act of choosing to promote Chiaramonte to Vice President of Engineering at FBG.

This chronology makes suspect Chiaramonte's claim that the person that hired him at fifty-two, when he was well into the protected class, and elected to retain and appoint Chiaramonte to the highest engineering post when he was fifty-seven, "had suddenly developed an aversion to older people" less than two years later, when Elting terminated Chiaramonte's position. *Rand v. CF Indus. Inc.*, 42 F.3d 1139, 1147 (7th Cir. 1994). Thus, a strong presumption and inference of nondiscrimination exists.

2. Rebutting the Presumption of Nondiscrimination

Chiaramonte's attempt at rebutting the inference of nondiscrimination consists of two distinct arguments. First, Chiaramonte argues that Elting was not the sole decision-maker, and that people other than Elting, who also took part in the decision, made statements from which a reasonable juror could infer that age played a part in Chiaramonte's termination. Second, Chiaramonte contends that FBG's reasons for terminating him directly conflict with additional evidence, giving rise to a genuine issue of material facts which, in turn, requires a trial.

a. The Decision-Maker

With regard to Chiaramonte's first argument, the facts show that Elting alone had the hapless task of determining who would be terminated. The three exhibits cited by Chiaramonte (the Elting deposition excerpts, statements by an accountant, Debbie Lunn, and Ernst & Young documents) do nothing to dispute this fact.

Chiaramonte argues that, because Elting forwarded the list of twelve soon-to-be-laid-off employees to FBG and L&P corporate and legal staffs, and discussed his determinations with L&P's Senior Vice President, Elting was not alone in making the decision to terminate Chiaramonte. However, Elting testified that he had the sole power to compile the list and make the terminations, but allowed the company "higher-ups" to review the list anyway. Elting slated twelve employees for termination, and Elting alone terminated all twelve of the employees. Neither the corporate and legal staffs nor the Senior Vice

President commented on, criticized, or amended Elting's list.

Elting stated in his deposition that he was uncertain whether he discussed "any of the reductions in management" with Singer prior to the actual termination. Chiaramonte argues that the statement shows that Singer was involved in the decision-making. However, Elting's acknowledgement of uncertainty is not contrary to his testimony that he alone made the termination decisions. Although Elting and Singer may have discussed "reductions in management" prior to Chiarmonte's termination, there is no evidence that the two discussed the reasons for terminating Chiaramonte (or any of the eleven other terminated management-level employees, including Singer's daughter). Moreover, Elgin's "uncertainty" is clarified by Singer's unequivocal testimony that no such conversation ever took place. Both Elting and Singer testified that Elting had the sole authority to terminate employees and was the sole decision-maker in all twelve of the "second wave" management position terminations, which included Chiaramonte's layoff. Noting Chiaramonte has submitted refutes this testimony. Thus, the court finds no factual dispute as to whether Elting alone made the decision to terminate Chiaramonte.

As such, any post-termination comments Singer may have made for Chiaramonte's termination are irrelevant. Singer's alleged statement, "Well, there's age," is not the well-grounded "smoking gun" admission perceived by Chiaramonte. Singer denies making the statement, and Chiaramonte is unable to corroborate his own allegation. Indeed, when cross-examined, Chiaramonte expressed

uncertainty as to whether Singer made that actual statement. Instead, Chiaramonte stated under oath that Singer told him "age had to be a factor . . . but I don't know." The context of the statement shows that Singer was merely speculating as to why Elgin made the decision to fire Chiaramonte. Yet, even assuming that Singer made such a statement, the statement cannot be considered an admission by FBG. Post-termination statements made by non-decision-makers have no bearing on the instant age discrimination query – whether the decision-maker, Elting, chose to terminate Chiaramonte because of his age. *See Tennes v. Massachusetts Dep't of Revenue*, 944 F.2d 372, 278 (7th Cir. 1991). Post-termination statements made by non-decision-makers are not probative of the employer's pre-termination mental state, do not affect the decision to terminate, and are immaterial in age discrimination cases. *Id.*

Even if Singer were a decision-maker, that arguable confession of a legal wrong does not necessarily create legal liability. *Dranchak v. Akzo Nobel Inc.*, Nos. 95-3116 & 95-3561, slip op. at 7 (7th Cir. July 3, 1996). "The ADEA forbids an employer to make age the basis for adverse action, but it creates a remedy only if the forbidden consideration altered the employer's decision." *Id.* "[I]f the employer knows of a legitimate and independently sufficient reason for discharge [in addition to the plaintiff's age], and relies on this reason at the time of the discharge, then age did not lead to any adverse action." *Id.*

Chiaramonte also points to evidence that a consulting firm, Ernst & Young, was "actively advising" FBG to

change Chiaramonte's function to "exist outside the formal engineering structure and . . . report directly to the General Manager." According to Chiaramonte, this advice shows that Elting was not the sole decision-maker on hiring and firing. However, Chiaramonte's own words refute his contention. According to Chiaramonte, Ernst & Young "advised" Elting and his superiors; such advice, by definition, has no binding effect. Additionally, the record reveals that Elting later refused to take the advice of Ernst & Young and, in March 1992, terminated Chiaramonte's position instead of retaining Chiaramonte but limiting his functions to exist outside FBG's formal engineering structure.

Further, a statement made by Debbie Lunn, a "cost accountant," that "we are going to get rid of all you old people" is of no relevance here. Lunn denies making the statement. Yet, notwithstanding the denial, and assuming the statement was actually made, that statement is not proof of discrimination by FBG's decision-maker. Lunn played no role in Elting's decision to eliminate Chiaramonte's position, nor did she ever discuss with Elting Chiaramonte's termination before it occurred. Lunn attended no company meetings at which layoffs of the twelve managers were discussed, and was neither asked for nor provided with any information, evaluation, recommendation or other comment about Chiaramonte or his value to FBG. Lunn was unaware of Elting's decision to terminate Chiaramonte until the layoff was announced. Simply put, Lunn took no part in Chiaramonte's demise.

b. Conflicting Evidence

Chiaramonte next contends that statements made by Elting at an Illinois Department of Human Rights fact-finding conference, certain financial reports of FBG, and a release form FBG required Chiaramonte to sign after his termination all provide evidence from which a reasonable juror could infer that FBG "lied" about its reasons for terminating Chiaramonte. As the Seventh Circuit stated in *Shager v. UpJohn*, 913 F.2d 398 (7th Cir. 1990):

> [T]he question . . . is only whether . . . [the plaintiff] produced evidence from which a rational factfinder could infer that the company lied. . . . If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn. This is the common sense behind McDonnell Douglas. . . . The point is only that if the inference of improper motive can be drawn, there must be a trial. Id. (emphasis in original).

Id. at 401. However, the court finds that Chiaramonte has not produced evidence from which a rational factfinder could infer that FBG lied.

Chiaramonte argues that certain statements Elting made while at a fact-finding conference at the Illinois Department of Human Rights conflict with the "huge salary" and "wealth of talent" reasons given at Elting's deposition and are evidence that age played a factor in his termination. Elting told an investigator that Chiaramonte was fired because Chiaramonte would be unable to "crawl through the dirt while rebuilding the company," "cultural differences in the organization," and

because Chiaramonte didn't possess "team synergy." Chiaramonte argues that these three statements "are comments on [his] age" and have nothing to do with the reduction-in-force-related reasons. The court disagrees.

First, the reasons are not in conflict with those given by Elting in his deposition. The record makes clear the basis for Chiaramonte's termination: FBG was in dire financial straits; Elting had to fire Chiaramonte because his salary was too great and FBG was unwilling and unable to pay Chiaramonte the amount his "wealth of talent" required. The three statements given by Elting at the Illinois Human Rights Department Office were variables within the decision-making process. Given Elting's view that Chiaramonte would not be able to work together with other workers, would not perform the detailed, more menial tasks, and that Chiaramonte had cultural differences were factors in determining that Chiaramonte's salary was not commensurate with his economic value to FBG. Chiaramonte was "overqualified" for FBG's engineering staff. Thus, Elting chose to terminate Chiaramonte's position and retain lower-level employees with similar, but less-established, qualifications who were more likely to "mesh" with other employees.

Second, even assuming that the statements at the fact-finding hearing conflict with the salary/talent explanations given by Elting, the three statements are not probative of age discrimination; they are legitimate, nondiscriminatory reasons for Chiaramonte's termination. Synergy is defined as "working together; the action of two or more substances, organs, or organisms to achieve an effect of which each is individually incapable; the

theological doctrine that regeneration is effected by a combination of human will and divine grace." Webster's II New Riverside University Dictionary 1174 (1988). Moreover, it is not unlawful to terminate the positions of those who are unwilling to "crawl through the dirt" – or "do the dirty work" – necessary to rebuild a faltering company. Further, while firing an individual because of a "cultural difference" could, in some cases, be evidence of race or national origin discrimination in violation of Title VII of the Civil Rights Act of 1964 (as amended in 1991), Chiaramonte alleges only age discrimination in violation of the Age Discrimination in Employment Act.

Chiaramonte also argues that there is a genuine issue of material fact as to whether FBG actually incurred "operating" or "actual" losses, beyond its expected losses. This "ambiguity," according to Chiaramonte, should be resolved by a jury. In support of his argument, Chiaramonte points to a conflict between two alleged affidavits. However, the first affidavit was unsigned – and "hence unsworn" – unfiled, and legally invalid. *Sellers v. Henman*, 41 F.3d 1100, 1101 (7th Cir. 1994). Therefore, the affidavit is inadmissible. *Id.* However, the second affidavit, which was signed and filed with the court, is valid. Nonetheless, FBG explains to the court that the terms "operating losses" and "actual losses" are synonymous. The alleged "ambiguity" is of no consequence; Chiaramonte has not produced evidence to dispute that FBG expected to earn $3.6 million, but lost $6.6 million. This loss, whether it be an "operating" or "actual" loss, prompted a massive reduction in force in which FBG eliminated a total of 239 positions in order to "stay afloat." Chiaramonte's argument that FBG lied about its

losses and fired a third of its employees for reasons other than financial ones is unreasonable and would not cause a reasonable juror to find that the reduction-in-force was a subterfuge for discriminating against Chiaramonte because of his age.[5]

Finally, Chiaramonte argues that the release form signed by Chiaramonte was not only invalid and unenforceable, 29 U.S.C. § 626(f)(l) and *O'Berg v. Allied Van Lines*, 11 F.3d 679, 682 (7th Cir. 1993), but is direct evidence of willful discrimination. The court agrees that the release form was in violation of the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f)(l), in numerous ways.[6] Thus, Chiaramonte did not waive his

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[5] Chiaramonte also questions the amount saved by terminating him. Chiaramonte argues that pay increases given to Cummins in addition to salaries of two workers hired in February 1993 caused FBG to pay $114,000 for the same duties performed by Chiaramonte for $75,000. Yet, Chiaramonte improperly focuses this argument on events occurring after his layoff. FBG's profitability began to improve near the end of 1992, resulting in the need for additional hires and allowing FBG to reward those employees whose salaries were "frozen" during the company's financial woes. If the court were to accept Chiaramonte's argument, it would in effect have to hold that an inference of discrimination forms when a company that, at one time, was forced to "downsize" for financial reasons, subsequently hires additional employees and gives salary raises to employees it chose not to terminate. The court declines to accept Chiaramonte's reasoning and argument.

[6] According to Older Workers Benefit Protection Act, An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as

right to file suit in federal court. However,[7] the court is unaware of any precedent holding an improper release to be direct evidence of discrimination. The release was prepared and signed after Elting made the decision to terminate Chiaramonte. Thus, the release has no evidentiary value.

The record is clear: FBG terminated Chiaramonte's position because, at the time of termination, it made a business decision that it could not afford Chiaramonte or the other 239 employees fired between November 1991

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provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum –

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement.

29 U.S.C. § 626(f)(l).

and March 1992. In other words, FBG terminated Chiaramonte and 239 co-workers for salary and other economic reasons. Salary considerations are legitimate, non-discriminatory reasons for terminating employees.

> The ADEA was enacted by Congress because of its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes. However, when the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. . . . This rationale applies with equal force to cases where workers are discharged because of salary considerations. Compensation is typically correlated with age, just as pension benefits are. The correlation, however, is not perfect. A younger worker who has spent his entire career with the same employer may earn a higher salary than an older worker who has recently been hired by the same employer. Because age and . . . [compensation levels] are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on . . . compensation level is necessarily "age-based."

Anderson v. Baxter Healthcare, 13 F.3d 1120, 1125 (7th Cir. 1994). The court finds that FBG legally terminated Chiaramonte in compliance with the ADEA. Chiaramonte has not submitted evidence establishing a genuine issue of material fact. Without such evidence, the presumption of nondiscrimination remains. Accordingly, the court grants FBG's motion for summary judgment.

IV.

Chiaramonte has not met his burden of proving that FBG's articulated reasons were a pretext for age discrimination. Since Chiaramonte has not provided the court with sufficient evidence from which a reasonable juror could infer that FBG's articulated reasons were a "cover" for age animus, summary judgment in favor of FBG must be granted.

IT IS SO ORDERED.

ENTER:

/s/ Charles R Norgle, Sr
CHARLES RONALD NORGLE, SR., Judge
United States District Court

DATED: 7-11-96

Supreme Court, U.S.
FILED
APR 7 1998
CLERK

No. 97-1294

In The Supreme Court of the United States

OCTOBER TERM 1997

NICHOLAS A. CHIARAMONTE,

Petitioner,

v.

FASHION BED GROUP, INC.,
a division of LEGGETT & PLATT, INC.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. May Petitioner revive and relitigate the merits of his claim that his employer discriminated against him on account of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 623, by filing a petition for a writ of *certiorari* in this Court after Petitioner previously dismissed the same claim before the applicable state administrative agency voluntarily and with prejudice?

2. Should this Court change the rule it established in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993), and require a plaintiff in an age discrimination case to present **more** evidence at the summary judgment stage to rebut an employer's showing of a legitimate reason for plaintiff's discharge, when the district court found that no genuine disputes of material fact exist under the **less** stringent standard Petitioner admits the district court applied?

RULE 29.6 LISTING

Respondent Fashion Bed Group is the trade name under which Leggett & Platt, Inc., a publicly owned Missouri corporation, does business. Leggett & Platt, Inc. has no corporate parent, and no domestic subsidiaries other than wholly owned subsidiaries.

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STATUTES INVOLVED

29 U.S.C. § 623 Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer --

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

* * *

Respondent respectfully urges this Court to deny the petition for *certiorari* for the reasons stated below.

STATEMENT OF THE CASE[1]

Petitioner Nicholas Chiaramonte ("Chiaramonte") was the Vice-President of Research and Development for Fashion Bed Group ("FBG"), a Chicago-based manufacturer of brass beds. FBG eliminated Chiaramonte's job in early 1992 in the last of a series of personnel reductions that reduced FBG's total workforce by more than one-third.

John Elting ("Elting"), FBG's President, made all the relevant decisions about Petitioner, including the one to terminate him. When Elting hired him in 1985, Chiaramonte (then age 52) had been working for Dresher, the main competitor of FBG's corporate predecessor (Berkshire). Several years later, Leggett & Platt, Inc. separately acquired Berkshire, Dresher and a third competitor and merged the three companies to create FBG. When FBG merged the competitors' workforces in 1990, it laid off many unneeded workers. Elting chose to retain Chiaramonte (then age 57) rather than Chiaramonte's counterpart from Dresher to head the combined engineering functions of FBG.

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[1]The court of appeals' statement of facts (App. 2-5.) is complete and corrects several of Petitioner's misstatements of facts that the district court found to be undisputed.

In September 1991, Elting appointed Chiaramonte to the newly created position of Vice-President of Research and Development. At the same time, Elting assigned Rob Cummins, an employee who Chiaramonte originally hired at Berkshire, to be Director of Engineering. Chiaramonte's primary task was to lead FBG to new manufacturing methods, while Cummins (who was 34 years old and had far less work experience than Petitioner) was to handle the mundane, day-to-day engineering details.

Integrating the two competitors' manufacturing and administrative operations proved far more difficult than FBG anticipated. Lack of cooperation among employees who previously had been head to head competitors compounded problems with manufacturing equipment and administrative systems. FBG suffered losses in all four quarters of 1991. Rather than earning the $3.6 million profit expected for 1991, FBG lost $6.6 million on sales of $51.2 million. Because of these losses, Elting laid off one-third of FBG's hourly workforce and a handful of salaried employees in late 1991.

Business did not improve in the first two months of 1992: FBG lost an additional $900,000. Salaried employees worried about FBG's future and their own job security. Chiaramonte himself thought that more layoffs were likely; he recognized that there still were "two people in every slot." Elting picked a dozen salaried employees for termination; they ranged in age from 32 to 61. Petitioner was surprised

when Elting chose to include him among this group; Chiaramonte had thought his job was safe.

Elting used three criteria to evaluate FBG's salaried workers: salary, value to FBG and performance. He used salary information from a payroll register that reported workers' salaries, but not their ages. Elting chose to include Petitioner among the dozen salaried positions he eliminated because Chiaramonte's "huge salary" ($73,000 annually) made him a "luxury." Elting decided to retain the younger Director of Engineering both because Cummins did the detail work FBG needed to become profitable and because his salary was $35,440, less than half of Chiaramonte's. Elting passed his decisions along to his corporate superiors to assure that the terminations complied with applicable law. Elting himself delivered the news to Chiaramonte that his termination resulted from the need to "downsize."

Thus, Elting, who hired Petitioner at age 52, retained him at age 57 rather than his counterpart when the companies later merged, and most recently created a new position and promoted him to it at age 58, is the same person who decided to eliminate Petitioner's position when Petitioner was age 59.

REASONS FOR DENYING THE WRIT

Petitioner makes several efforts to articulate the type of "compelling reason" that Supreme Court Rule 10 requires

for granting a writ of *certiorari*. Instead, Petitioner's arguments reveal that this Court should decline to exercise its discretion to quantify the volume of evidence required in an age discrimination case to create a genuine issue of material fact regarding the issue of pretext (Pet. 9-10) for these reasons: 1) what Petitioner poses as a split among the circuits relates only to an issue that would not change the outcome of this case and was not presented to the courts below; 2) Petitioner's voluntary dismissal of his state administrative claim for age discrimination bars him from relitigating the same claim before this Court; and 3) the opinion below does not conflict with any decision of this Court on an "important federal question."

I. The Issue On Which Petitioner Claims The Circuits Are Split Would Not Affect The Ultimate Outcome Of The Case And Was Not Presented Below.

Petitioner contends that the circuits now apply two substantively conflicting formulations -- "pretext" and "pretext plus" -- to describe what evidence a plaintiff must produce to defeat an employer's motion for summary judgment in an age discrimination case. (Pet. 6-10.) Petitioner concedes that the Seventh Circuit applies the evidentiary standard more favorable to Petitioner. (Pet. 7, 12.) Yet the court below concluded that on this record Chiaramonte could not meet even this less stringent test. Even assuming that the circuits do apply differing standards,

Respondent respectfully urges this Court to address that issue in a case where the standard would actually make a difference in the result. Because it would not here, the Court should decline the Petitioner's invitation to grant *certiorari* here to render what would amount to merely an advisory opinion.

Petitioner contends that since this Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), the circuits are in conflict regarding the quantum of evidence a plaintiff must produce to defeat summary judgment in an indirect, "burden shifting" employment discrimination case. According to Petitioner, the lower courts have offered two essentially conflicting formulations in applying this Court's decision in *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S. Ct. 2742 (1993) ("*St. Mary's*"), to summary judgment motions in age discrimination cases. (Pet. 5-9.)

This Court's opinion in *St. Mary's* leaves open several avenues by which a jury may find discriminatory intent. The courts below have applied these principles in a wide variety of factual circumstances at the summary judgment stage. Petitioner correctly states that the Seventh Circuit has held that this Court's opinion in *St. Mary's* requires only evidence of "pretext." *E.g., Anderson v. Baxter Healthcare Corp.,* 13 F.3d 1120, 1122-24 (7th Cir. 1994). (App. 7, 12.) He contends this test conflicts with that applied by other circuits, which have required that an employee offer

both pretext evidence and additional evidence of discriminatory animus (the so-called "pretext plus" standard). (Pet. 7-9.)

Petitioner mistakenly focuses on the lower courts' use of conflicting language ("pretext" and "pretext plus") in applying *St. Mary's*. However, he does not claim there are inconsistent rulings among the circuits on facts like those in this case. Rather, Petitioner points out other circuits require *still more* evidence than the Seventh Circuit for a plaintiff to defeat his employer's motion for summary judgment than he provided here. (Pet. 7-8.) Chiaramonte does not contend that the outcome of his case would be any different under the purportedly higher standard applied by these other circuits. Thus, even if there were a conflict among the circuits, it would not change the result in cases like this one, where the plaintiff is unable to meet even the easier standard.

In cases such as *Sommerville v. United States*, 324 F.2d 712 (3d Cir. 1964), *cert. denied* 376 U.S. 909, 84 S. Ct. 663 (1964), this Court has declined to issue the type of advisory opinion that Petitioner seeks here. In *Sommerville*, this Court refused to review admittedly conflicting lower court rulings on a recurring issue despite the Government's request, because its resolution of the conflict would have no impact on the result reached below. *See Stern, Gressman, et al.*, Supreme Court Practice (7th ed.) at 173. *Accord, The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184, 79 S. Ct. 710, 713 (1959), *reh'g denied* 359 U.S. 999, 79 S.

Ct. 1115 ("while this Court decides questions of public importance, it decides them in the context of meaningful litigation. . . . Resolution here of the [issue on which the circuits conflict] can await a day when the issue is posed less abstractly.").

Petitioner here never urged the Seventh Circuit to raise its standard for defeating summary judgment to "pretext plus."[2] Rather, Petitioner unsuccessfully argued that he *had* presented enough evidence in response to FBG's motion for summary judgment that a jury reasonably could conclude FBG's reasons were pretextual and [the decisionmaker] lied about the reason for his decision. . . ." (Petitioner's Opening Br. in the Seventh Circuit, 14, 16; Petitioner's Reply Br. in the Seventh Circuit, 5.)[3]

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[2]Similarly, Petitioner argues for the first time the severance agreement and release he signed violated Illinois' Wage Payment Statute and Collection Act. (Pet. 19.) Such new claims should not be the basis for jurisdiction under Sup. Ct. R. 10.

[3]What Petitioner argued below was that a jury might "disbelieve [the decisionmaker's testimony]" and find that FBG's explanations might not "ring true" if the case were tried. This claim was undercut by Petitioner's open embrace of *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627 (7th Cir. 1996), where the Seventh Circuit held that the mere possibility that the jury "might not believe" testimony articulating the reasons for the employer's decision does not require a trial; plaintiff must present directly contradictory facts to create a genuine dispute under Fed. R. Civ. P. 56. *Emmel*, 95 F.3d at 634, n.3 (citation omitted).

What Petitioner really wants is not a new "pretext plus" standard; it is higher than the one he already could not meet. Rather, Chiaramonte desires a third opportunity to argue the sufficiency of his evidence under an already favorable "pretext" rule. If this Court does perceive a conflict among the circuits on the issue Petitioner raised, Respondent respectfully urges the Court instead to select a case in which this issue was briefed and ruled upon below, and one in which its resolution would change the result. This is not such a case.

II. Petitioner's Voluntary Dismissal Of The Same Claim With Prejudice Bars Him From Relitigating It Before This Court.

Chiaramonte filed an administrative charge alleging age discrimination with the Illinois Department of Human Rights ("IDHR") in 1992. (Resp. App. 1-4.)[4] In 1995, Chiaramonte moved the Illinois Human Rights Commission ("IHRC") to stay the proceedings on the complaint based on that charge (Resp. App. 5-9) in order to file this federal lawsuit in the Northern District of Illinois. The IHRC complaint is substantively identical to his federal ADEA claim: in both, Petitioner alleges that FBG discriminated

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[4]Respondent's Appendix ("Resp. App.") contains Petitioner's Charge and the other pleadings referred to above. These pleadings do not appear in the Petitioner's Appendix of this case because Petitioner filed his dismissal motion and the IHRC granted it after the Seventh Circuit issued its Opinion.

against him on account of his age based upon the same facts. (Resp. App. 2-4, 5-7.) His state claims remained pending before the state agency, while he prosecuted the instant lawsuit in the federal courts.

The Seventh Circuit affirmed summary judgment on his claims in November, 1997. Chiaramonte then voluntarily filed a motion with the IHRC to dismiss his action, with prejudice, in January, 1998. The IHRC granted Chiaramonte's motion and dismissed the action with prejudice on January 21, 1998. (Resp. App. 10-11.)

Chiaramonte's voluntary dismissal of his complaint in the IHRC **with prejudice** is a nonappealable final adjudication of his claim on the merits under Illinois law. *People v. Creek*, 94 Ill.2d 526, 531-32, 447 N.E.2d 330, 332-33 (1983); *Arlington Heights v. American National Bank & Trust Co.*, 72 Ill. App. 3d 744, 391 N.E.2d 108 (1st Dist. 1979). Chiaramonte thus "abandoned" his age discrimination claim "by his deliberate and voluntary act" and cannot reinstate it before the IHRC. *Weisguth v. Supreme Tribe of Ben Hur*, 272 Ill. 541, 543, 112 N.E. 350, 351 (1916).

Nonetheless, Chiaramonte filed his petition in this Court seeking the very thing he voluntarily surrendered at the IHRC: another adjudication of this same claim. This Court's holding in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466-67, 102 S. Ct. 1883 (1982), requires federal courts to give the same preclusive effect to state court

judgments that those judgments would be given in the courts of the state from which the judgments emerged. Petitioner's effort to revive the same claim that he recently voluntarily dismissed with prejudice before the state agency presents a fatal jurisdictional bar that should prompt this Court to deny *certiorari*.

III. The Opinion Below Does Not Decide An Important Federal Question In A Way That Conflicts With Any Decision Of This Court

A. The decision below does not conflict with this Court's precedents setting the standards for summary judgment.

Petitioner also contends that the decision below conflicts with this Court's opinions interpreting Fed. R. Civ. P. 56, such as *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986).[5] The source of Petitioner's disappointment below was not any "basic conflict" between

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[5]Petitioner claims to have found a "basic conflict" between Rule 56 and the "burden shifting approach" crafted in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). (Pet. 10.) Again, Petitioner did not urge the lower courts to abandon the burden shifting method. Trial courts routinely conclude in these as in other types of cases that there are no genuine disputes concerning the material facts. The record here reveals no reason to think that the *McDonnell Douglas* approach made it any easier for the district court to grant summary judgment on the particular facts here than in other instances where the parties dispute the reasons that specific actions were taken.

Rule 56 and the "burden shifting approach crafted in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), as Petitioner posits. (Pet. 10.) Rather, what Petitioner replays to this Court is his continuing quarrel not with what standards are appropriate, but with the district court's application of them. Because this case thus presents nothing more than a claim that the trial court made "erroneous factual findings or [misapplied] a properly stated rule of law" a writ of *certiorari* would be inappropriate under SUP. CT. R. 10.

Contrary to Petitioner's claim, neither the district court's rulings nor the Seventh Circuit's decision conflict with the well settled standards for granting summary judgment under Fed. R. Civ. P. 56. *See Celotex Corp. v. Cattrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986) (a party opposing summary judgment must set forth specific facts showing that there is a genuine issue for trial). Both courts below applied *Celotex* as well as *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S. Ct. 2505 (1986). (Pet. 11.) (App. 5; Supp. App. 7-8.)

The Seventh Circuit did not simply "accept[] financial justification for any termination decision, no matter what other evidence exists of pretext." (Pet. 20.) Rather, the Seventh Circuit, after *de novo* factual review, agreed with the district court that Chiaramonte had no evidence which materially disputed the facts underlying FBG's business justifications. (App. 18-22.) Both courts found it undisputed

that FBG had lost money, and lots of it; both noted Chiaramonte's own recognition that there were two people in every position. This left the real dispute here not about the facts, but management's judgments based upon those facts: that a dozen salaried positions should be eliminated to reduce operating costs; that Chiaramonte's relatively "huge" salary made him one of those who FBG "could get by without;" and that lower cost employees who were performing "mundane" but necessary "detail" work were more essential to retain. (Supp. App. 3-6, 23-24; App. 3-4, 16-19.)[6]

The Seventh Circuit's refusal to let a jury second guess the employer's business judgments is not a standard "under which no plaintiff can prevail." (Pet. 14.) Petitioner could have (had there been any such facts) shown evidence of pretext, or direct evidence of age bias. He did neither. On the facts here, even if a jury concluded that the employer had preferred the "wrong" skills and picked the "wrong" people to retain, its verdict would be the product of different business judgments rather than evidence of age animus. Thus, Petitioner's failure to win this case was the result of

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[6]Petitioner did not argue that this case involved an unsettled but "important question of federal law" that justifies *certiorari* under Rule 10(c). Even if he had made this argument, the district court and the Seventh Circuit agreed that Chiaramonte had not raised **any** dispute about the material facts that prove FBG's legitimate business justifications. They applied the less stringent "pretext" standard, which does not require additional "pretext plus" evidence.

lack of evidence, not the standard applied by the courts below.

Petitioner accuses the Seventh Circuit of failing to mention the age of his alleged "replacement" and not reciting all of the evidence offered to oppose the motion for summary judgment. (Pet. 11, 13.) The district court noted the twenty-plus year age differential between Petitioner and his alleged replacement, who the court of appeals described as "substantially younger" than Petitioner. (Supp. App. 15-16; App. 13.) Moreover, Rule 56 imposes no bookkeeping requirement that courts itemize each piece of evidence presented and explain why each is insufficient to preclude summary judgment. The courts had a complete factual record concerning every one of the topics Petitioner now rehashes, and he points to no error that would be anything more than harmless.[7]

Petitioner's rendering of the facts is deceptive. He misstates FBG's cost savings from its termination of Chiaramonte. Petitioner initially miscalculates FBG's savings as the difference between his own salary and

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[7]See, for example: Pet. 1, 17-18; App. 9-10; Supp. App. 19-20 (speculation that age was a factor by non-decisionmaker who even Chiaramonte admitted said he "didn't know" why the decision had been made); Pet. 4 and App. 17-19 (FBG's decision to cut its salaried personnel costs at the same time its corporate parent paid for consultants to assimilate the merged companies' manufacturing and administrative operations).

Cummins' salary.[8] Petitioner then compounds his mathematical error by adding hyperbole to it, contending that he could demonstrate to a jury by "simple calculations" that "FBG saved nothing" by terminating him. (Pet. 15-16.) Yet he never has disproved FBG's commonsense demonstration that when it terminated Chiaramonte, it stopped paying any of Petitioner's "huge" salary. Finally, Petitioner accuses FBG of "replacing" him more than nine months after his termination, but fails to advise this Court that each of the two alleged "replacements" was 56 years old and earned a salary about half the size of Chiaramonte's.[9]

Finally, the courts below did not "resolve[] conflicts in the evidence" or "conclude[] issues of intent," as Petitioner contends. (Pet. 11.) To the contrary, the trial judge here did no more than he would have at trial: he performed the gatekeeping function under FED. R. EVID. 104(a), and then made the same ruling that would have been appropriate under FED. R. CIV. P. 50(a), that no reasonable jury could interpret the evidence the same way Petitioner

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[8]Cummins earned $35,440 per year; Chiaramonte's annual salary was $73,000. Petitioner mistakenly calculates FBG's savings as the difference between the two, or $40,000. (Pet. 4, 21; App. 4; Supp. App. 6, 25 n.5.)

[9]In February of 1993, FBG hired two 56 year old employees in the engineering department, Robert Demkowicz and James Hacek. Although they were substantially the same age as Chiaramonte, their combined two salaries were about the same as Chiaramonte's single salary.

urges. As the district court put it, "Chiaramonte's argument that FBG lied about its losses and fired a third of its employees for reasons other than financial ones is unreasonable and would not cause a reasonable juror to find that the reduction-in-force was a subterfuge for discriminating against Chiaramonte because of his age." (Supp. App. 24-25.) Nor did the district court have to "interpret . . . statements as to their meaning" (Pet. 15.) to conclude that even if Chiaramonte's evidence were taken as true, it would not be a sufficient basis from which a reasonable juror could infer "that FBG's articulated reasons were a 'cover' for age animus." (Supp. App. 28.)

B. The decision below does not conflict with this Court's precedents applying a burden-shifting analysis to employment discrimination cases.

Petitioner incorrectly claims that the Seventh Circuit erred by "add[ing] an additional step to the burden-shifting formula" this Court established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), to determine whether the evidence offered by a plaintiff creates a genuine dispute of material fact that requires denial of the employer's motion for summary judgment. (Pet. 11.) The reality is that the Seventh Circuit applied the same burden-shifting principles that the lower courts have applied for the past quarter century. The court also considered the fact that the "same decisionmaker" who eliminated Chiaramonte's position and terminated his employment at age 59 previously

had chosen to hire him (when Chiaramonte was 52 years old) and also to retain him rather than his counterpart in the merger of two competitors' workforces (when Chiaramonte was 57) and to promote him to a higher position (when Chiaramonte was 58).

Contrary to Petitioner's assertion, a court's consideration of the "same decisionmaker" facts does not conflict with this Court's ruling in *O'Connor v. Coin Caterers*, 517 U.S. 308, 116 S. Ct. 1307 (1996). (Pet. 11-12.) No facts concerning a presumption of non-discrimination were presented in *O'Connor*, and no such argument was raised. Rather, *O'Connor* held that the fact that one employee who is protected by the ADEA is replaced by a co-worker who is substantially younger is sufficient proof of one of the four elements of the plaintiff's *prima facie* case.

Petitioner mistakenly suggests that *O'Connor* should be extended to hold that the facts establishing a single element of a *prima facie* case "alone [are] enough to counter-balance any presumption of non-discrimination." (Pet. 13.) However, a plaintiff's establishment of *all* four elements of a *prima facie* case creates only "a rebuttable" inference that an employment decision was based on an illegal discriminatory criterion." 517 U.S. at 311, 116 S. Ct. at 1309. The new rule Petitioner urges thus would deprive the "same decisionmaker" facts of any weight and, in substance, transform the *prima facie* case into the basis for an

irrebuttable presumption. Such a result would fly in the face of *O'Connor*, which reiterates this Court's long-standing holding that the *prima facie* case merely shifts the burden of production to the employer to articulate a legitimate nondiscriminatory reason for its employment decision. 517 U.S. at 311, 116 S. Ct. at 1309-10. In addition, such a rule would conflict with Petitioner's own admission that the "same decisionmaker" facts "may be a defense to a claim of age discrimination." (Pet. 12.)

Contrary to Petitioner's claim, the Seventh Circuit did not give too much weight to these facts. The lower court did not use the circumstantial evidence here -- the identity of the decisionmaker and the timing of his several advancements of Petitioner prior to deciding to eliminate his position -- to make Petitioner carry any heavier a burden than he already held under the circumstances. The rules for this evidentiary "tug of war" between employee and employer remained unchanged here. The inference of discrimination that an employee initially receives by proving the facts that make up a *prima facie* case lasts only until the employer provides legitimate business reasons for its decision. The presumption, as it often is called, then "dissolves." *St. Mary's*, 509 U.S. at 507. Even Petitioner agrees to this familiar summary of the usual burden-shifting analysis. (Petitioner's Opening Brief in the Seventh Circuit, 12.)

Here, the courts below did not depart from the standard burden-shifting approach. (App. 11 *passim*.)

Under the traditional burden shifting analysis, FBG's articulation of legitimate business reasons dissolved the presumption created by Petitioner's *prima facie* case. (Supp. App. 16; App. 12-13.) The Seventh Circuit simply "consider[ed]" the "same decisionmaker" facts in the traditional context of "assessing whether Chiaramonte has met his burden of showing pretext. . . ." (App. 14; *see* App. 14-16.) The Seventh Circuit both found the "same decisionmaker" facts to be undisputed, and also concluded that Petitioner's separate pretext arguments did not preclude summary judgment because they were unsupported by admissible facts.

The court thus rejected Petitioner's arguments that FBG's cost savings were insufficient to motivate the company's decision (App. 16-19) and to show that FBG's reasons did not actually motivate Petitioner's discharge, because Petitioner failed to raise any genuine dispute about the facts on which FBG's business justification were based. These were Petitioner's burdens under the traditional *McDonnell Douglas* analysis, and the court below considered them wholly independent of any presumption of non-discrimination. (App. 19-22.)

"[A]fter a review of all the evidence" the court of appeals concluded that Petitioner "failed to establish a genuine issue of material fact as to whether FBG's proffered reasons for his dismissal were pretextual." (App. 22.) In explaining this conclusion, the court below emphasized that

its result was only "particularly true in light of the presumption of non-discrimination. . . ." *Id.* The Seventh Circuit did not "adjust" the "scales" (Pet. 13) by increasing Petitioner's burden of proof on the pretext issue. Instead, like the district court, it held that Chiaramonte failed to demonstrate a material dispute concerning facts that would (if proved) meet his *McDonnell Douglas* burden. (App. 22; Supp. App. 27.)

CONCLUSION

For each of these reasons, Respondent respectfully urges the Court to deny the Petition for Writ of Certiorari.

Dennis P.W. Johnson
Counsel of Record

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Counsel for Respondent

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY: FEPA: X; EEOC: X.
Charge Number 1992CA3645

Illinois Dept. of Human Rights and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.)
Mr. Nicholas A. Chiaramonte

HOME TELEPHONE NUMBER (include Area Code)
(708) 598-3721

STREET ADDRESS
10347 S. Alta Drive

CITY, STATE AND ZIP CODE
Palos Hills, IL 60465

DATE OF BIRTH:
11/29/32

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME
Fashion Bed Group

NUMBER OF EMPLOYEES, MEMBERS
15+

TELEPHONE (Include Area Code)
(708) 458 1800

STREET ADDRESS
5950 W. 51st Street

CITY, STATE AND ZIP CODE
Chicago, IL 60638

COUNTY
Cook

NAME

TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS

CITY, STATE AND ZIP CODE

COUNTY

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))
Race:
Color:
Sex:
Religion:
National Origin:
Retaliation:
Age: X

Disability:
Other (Specify)

DATE DISCRIMINATION TOOK PLACE
Earliest (ADEA/EPA)
03/13/92

Latest (All)
03/13/92
Continuing Action

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):

I. On March 13, 1992, I was laid off from my position as vice president of research and development. I was hired March 11, 1985.

II. John Elting, (39), President, told me I was laid off due to downsizing because my division was losing money.

III. I believe I have been discriminated against because of my age, 59, in that:

A. I have a good work performance record.

B. Respondent's policy and practice is to keep the employee with the most seniority and experience.

C. There was no reduction on the volume of Respondent's business.

D. At the time of my lay off Respondent replaced me with Rob Cummins (36), Manager of Engineering. Rob had less seniority and experience than I. Rob is performing my job duties at substantially less pay.

CBS/1dc
X: I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY (When necessary for State and Local Requirements)
/S [Undecipherable.]

I declare under penalty of perjury that the foregoing is true and correct.

Date
Charging Party (Signature)

I swear or affirm that I have read the above charge and that it is true to the best of y knowledge, information and belief.

SIGNATURE OF COMPLAINANT
/S Nicholas Chiaramonte

DATE 6-25-92

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)

Resp. App. 5

Stamped:
RECEIVED Jan 27 1994
Human Rights Commission
Administrative law
Division
No 92 CA 3645

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:
NICHOLAS CHIARAMONTE,
Complainant,

and

FASHION BED GROUP, INC.,
Respondent

Charge No. 92 CA 3645
EEOC No. 21B22551

COMPLAINT OF CIVIL RIGHTS VIOLATION

In accordance with the provisions of the ILLINOIS HUMAN RIGHTS ACT ("Act"), 775 ILCS 5/1-101 et seq., and pursuant to the authority vested in it by the Act, the ILLINOIS DEPARTMENT OF HUMAN RIGHTS ("Department") hereby issues and files its Complaint in this cause as follows:

PARAGRAPH ONE: That complainant, Nicholas Chiaramonte, filed Charge No. 1992 CA 3645, with the

Department on June 25, 1992, alleging on his own behalf to have been aggrieved by practices of age discrimination, prohibited by Section 2-102(A) of the Act;

PARAGRAPH TWO: That at the time of the incidents complained of herein, Respondent, Fashion Bed Group, Inc., was an "Employer" as defined in Section 2-101(B)(1)(a) and was subject to the provisions of the Act;

PARAGRAPH THREE: That Complainant's age at the time of the incidents complained of herein was 59;

PARAGRAPH FOUR: That complainant was hired by Respondent on March 11, 1985, and he held the position of vice president of research and development at the time of the incidents alleged herein;

PARAGRAPH FIVE: That complainant always performed his assigned job duties in an acceptable manner consistent with Respondent's standards;

PARAGRAPH SIX: That on March 13, 1992, Complainant was placed on indefinite layoff which effectively discharged him from his position with Respondent;

PARAGRAPH SEVEN: That Respondent's articulated reason for discharging Complainant was its downsizing and restructuring due to adverse business conditions;

PARAGRAPH EIGHT: That Respondent's stated reason for Complainant's discharge is a pretext for unlawful discrimination;

PARAGRAPH NINE: That at the time of Complainant's layoff, Respondent assigned all Complainant's duties to Robert Cummings (age, 36), and Burt Steward (age, 40);

PARAGRAPH TEN: That after his layoff, Complainant's job responsibilities were assumed by younger, less experienced employees;

PARAGRAPH ELEVEN: That during the period of time relevant to Complainant's layoff, Respondent eliminated the positions of eight other professional/managerial employees similarly situated to Complainant, and all of these positions had been occupied by individuals who were over forty years of age;

PARAGRAPH TWELVE: That Respondent subjected Complainant to a layoff resulting in his discharge, because of his age, 59, in violation of Section 2-102(A) of the Illinois Human Rights act.

WHEREFORE, an ORDER is requested providing the following relief:

(a) That Respondent reinstate Complainant to a position comparable

to what he would have had at a rate of pay comparable to what he would be receiving if not for the civil rights violation committed against him by Respondent;

(b) That Respondent pay to Complainant a sum equal to any loss of wages he may have suffered as a result of the civil rights violation committed against him by Respondent;

(c) That Complainant be made whole as to all benefits and seniority status that would have accrued to him but for the civil rights violations committed against him by Respondent;

(d) That Respondent cease and desist from discriminating on the basis of age in its employment practices;

(e) That Respondent pay to Complainant reasonable attorney's fees and costs incurred as a result of the civil rights violation alleged herein;

(f) That any and all public contracts with the State of Illinois held by Respondent shall terminate immediately;

(g) That Respondent shall be barred from holding any public contract for a period up to, but not to exceed, three years;

(h) That a penalty up to, but not to exceed, the profit earned by Respondent as a direct result of this civil rights violation shall be paid to the State Treasurer; and

(i) That such further relief be granted as may be necessary to make Complainant whole.

ISSUED AND FILED THIS 27th DAY OF JANUARY, 1994.

DEPARTMENT OF HUMAN RIGHTS
ROSE MARY BOMBELA, DIRECTOR

BY: /S/
John R. Petruszak
Staff Attorney

John R. Petruszak
DEPARTMENT OF HUMAN RIGHTS
100 W. Randolph St/Suite 10-100
Chicago, Illinois 60601
(312) 814-4334

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
NICHOLAS CHIARAMONTE,	)	
	)	
Complainant,	)	
	)	Charge Nos.
	)	1992CA3645
and	)	EEOC
	)	ALS Nos. 7967
FASHION BED GROUP, INC.,	)	
	)	
Respondent.	)	

MOTION FOR VOLUNTARY DISMISSAL

Complainant hereby moves to dismiss, with prejudice, the Complaint in the above-captioned matter and the underlying charge filed with the Illinois Department of Human Rights.

This motion is being made of Complainant's own free will, without pressure from any organization or individual.

NICHOLAS CHIARAMONTE
1/1/98

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)
	)
NICHOLAS CHIARAMONTE,	)
	) Charge Nos.
Complainant,	) 1992CA3645
	) EEOC Nos.
	) 21B22515
and	) ALS Nos. 7967
	)
FASHION BED GROUP, INC.,	)
	)
Respondent.	)

FINAL ORDER AND DECISION

This matter comes before me on Complainant's motion for voluntary dismissal pursuant to Section 5300.780 of the Rules and Regulations of the Illinois Human Rights Commission, 56 Ill. Admin. Code ch. XI Section 5300.780 (1992). Complainant, who is represented by counsel, alleges that the motion is made of his own free will, without external pressure. I conclude that the motion is knowlingly and voluntarily made within the meaning of Section 5300.780. I therefore dismiss this case and the underlying Charge No. 1992CA3645 with prejudice.

HUMAN RIGHTS COMMISSION
By: HELEN W. GUNNARSSON
ADMINISTRATIVE LAW JUDGE

ADMINISTRATIVE LAW SECTION
ENTERED: January 21, 1998